90-1269

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1990

FUNCTION JUNCTION, INC., et al.,
Petitioners,

v.

PAUL CROWE, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Does the Daytona Beach "nudity, sexual conduct prohibited" ordinance which as construed prohibits exposure in commercial establishments where liquor may be consumed, of any portion of the female breast below the top of the areolae and any portion of the buttocks, irrespective of context or pervasiveness, whether live or on film or photographs, allow the police discretion to make arrests in a selective or discriminatory manner, in violation of the First and Fourteenth Amendments and contrary to Houston v. Hill, 482 U.S. 451 (1987)?

II. Does the failure to narrowly construe the Daytona Beach "nudity, sexual conduct prohibited" ordinance which, as broadly interpreted, prohibits in commercial establishments where liquor may be consumed, entertainment entitled to the protection of the First Amendment which depicts exposure of any portion of the buttocks or any portion of the female breast directly below the top of the areolae, whether live or on film or in the form of a photograph, violate the First Amendment as construed in Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)?

III. Does the imposition of attorney fees and double costs as sanctions upon the parties under Fed. R. App. P. 38 without any notice or an opportunity to be heard in a case which all prior courts have found the issue fairly debatable, violate due process of law contrary to this Court's decision in Roadway Express, Inc. v. Piper, 447 U.S.752 (1980).

LIST OF PARTIES BELOW

PETITIONERS

FUNCTION JUNCTION, INC., a Florida Corporation

PINK PUSSYCAT, INC., d/b/a Red Garter Club, a Florida Corporation

DEL PERCIO, INC., d/b/a Single Shack, a Florida Corporation

CHRIS GEANEAS

DAWN BOIDO (HEISER)

DENISE DEL PINTO

LESLIE GRIER (HAMLIN)

RESPONDENTS

PAUL CROWE, as Chief of Police of Daytona Beach, Florida. The former Chief of Police, Charles W. Willets, was a party in both courts below. However, pursuant to Rule 35.3 of this Court, his successor has been designated as a Respondent in this Petition.

CITY OF DAYTONA BEACH, a former municipal corporation

There are no entities to report or list pursuant to this Court's Rule 28.1.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

FUNCTION JUNCTION, INC.,
Chris Geaneas, Pink Pussycat, Inc.,
d/b/a Red Garter Club, DEL PERCIO,
INC. d/b/a Shingle Shack, DAWN
BOIDO (HEISER), DENISE DEL PINTO
and LESLIE GRIER (HAMLIN),

Petitioners,

PAUL CROWE, as Chief
of Police of Daytona Beach, Florida and
CITY OF DAYTONA BEACH, FLORIDA, an
incorporated municipality

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as Geaneas v. Willets, 911 F. 2d 579 (11th Cir. 1990) and is reprinted in Appendix A. The unreported Memorandum Opinion and Order on Motion for Summary Judgment of the United States District Court for the Middle District of Florida is reprinted in Appendix C. The reported Order of the District Court dismissing this case,

Geaneas v. Willets, 715 F.Supp. 334 (1989), is reprinted in Appendix D.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its opinion on September 10, 1990. Petitioners' Request for Rehearing and Suggestion for Rehearing En Banc was denied on November 9, 1990. Appendix B. The opinion of the Court of Appeals, upholding the final judgment of the District Court, constitutes a final judgment in a civil case. This Court has jurisdiction pursuant to 28 U.S.C. Sec. 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment One

Congress shall make no law...abridging the freedom of speech...

United States Constitution, Amendment Fourteen, Section One

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdicition the equal protection of the laws.

United States Constitution, Amendment Twenty-one, Section Two

> The transportation or importations into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited

Provisions of Daytona Beach Municipal Code

> The applicable provisions of the Daytona Beach Municipal Code are included in the opinion of the Court of Appeals, as reprinted in Appendix A. Section 5-25, Nudity, Sexual Conduct Prohibited and Section 5-1, defining establishments dealing in alcoholic beverages.

STATEMENT OF THE CASE

At issue is Daytona Beach Ordinance 81-334 enacted on October 21, 1981, and codified as City of Daytona Beach Code Section 5-25. PINK PUSSYCAT, INC., FUNCTION JUNCTION, INC., and DEL PERCIO, INC. are all commercial establishments within the City of Daytona Beach which attempted to present female dancers as entertainment while allowing the sale and consumption of alcohol. The employees and agents of the establishments, including owners such as Geaneas, bartenders such as Boido, and dancers, including Del Pinto and Grier, were subject to frequent inspections and charges under section 5-25.

On September 23, 1982, County Judge Norton Josephson (see Appendix E), in a case involving Petitioner, Grier, narrowly construed Section 5-25(a) finding:

> "that in order to find any person in violation of the ordinance, all of his order buttocks must be exposed"

and dismissed the charge as it was uncontradicted that Ms. Grier's buttocks were partially covered.

The City of Daytona Beach ignored the interpretation of Judge Josephson and continued to make additional charges broadly construing the ordinance. On April 21, 1983, County Judge McDermott dismissed a group of charges, including those involving Petitioners Grier and Del Pinto, adopting the ruling of Judge Josephson regarding the buttocks and narrowly construing the breast portion of the ordinance to require that "a female person expose at least a portion of the areolae to the public view to be in violation" (Appendix F). The gist of the breast ruling was:

> In accordance with the principles laid down in Foley the court interprets the phrase "at or below the areola" to mean from the upper portion of the areola to the bottom of it on each breast. This would not require a covering on a line running from the top of one areola across to the top of the other. That interpretation would require more covering than is presently seen on our beaches or behind ski tow boats.

On May 10, 1983, the ruling of Judge Josephson in the Grier case was upheld on appeal by the Circuit Court in and for Volusia County on November 21, 1983, Judge C. McFerrin Smith, III issued an opinion also indicating the ordinance should be narrowly construed. Appendix G.

On May 9, 1983, a Complaint was filed by Petitioners in the District Court requesting injunctive and declaratory relief and money damages under 42 U.S.C. § 1983. The complaint included a request that the Court enjoin enforcement in violation of the narrowing decisions of the Volusia County courts.

On July 27, 1983, the District Court entered an order staying this cause until various pending state court litigation was resolved.

In 1984 the Fifth District Court of Appeal for the State of Florida noted the difficulty the lower courts had in interpreting the ordinance and found it to be "vague, overbroad, not fairly enforceable, and thus unconstitutional". See Del Percio v. City of Daytona Beach, 449 So.2d 323 (Fla. 5th DCA 1984). Unfortunately for Petitioners the Florida Supreme Court reversed the ruling of the Fifth District Court of Appeal in City of Daytona Beach v. Del Percio, 476 So.2d 197 (Fla. 1985) stating that "the plain meaning of the ordinance was that no portion of the breast directly or laterally below the top of the areola may be exposed to public view." The City directed Petitioners to have their performers comply and to remove all photographs from the premises depicting this breast exposure.

The Petitioners continued to seek relief in the District Court and despite the fact that Petitioners were willing to operate as a bottle club or sell only liquor produced within the state the court issued its Memorandum Opinion and Order of Motions for Summary Judgment (Appendix C) on January 12, 1988, finding the ordinance facially valid.

The case proceeded to trial on February 22, 23 and 28, 1989, on the "as applied" and selective enforcement issues. At trial Petitioners proved that numerous violations of the ordinance are ignored by the Daytona Beach Police Department while they are singled out for prosecution. The District Court stated:

> The evidence was undisputed that in commercial establishments dealing in alcohol, excluding such establishments which provided exotic dance as entertainment, portions of the female breast below the areola and portions of the buttocks were exposed without arrests being made, even though the violations were known to Daytona Beach police officers who were present at the time. These violations of the Ordinance were more prevalent during "bike week" and "spring break", when wet t-shirt contests and bikini contests at the pool-side bars along the city's famous beach resulted in numerous technical violations of the Ordinance, with an estimated fifty percent or more of the females present at these events wearing bathing suits exposing a portion of the buttocks. (Emphasis supplied)
>
> (Appendix D)

The District Court agreed with Petitioners that the portion of the ordinance prohibiting buttocks exposure is somewhat vague but extrapolated the section stating:

> After consideration of the wording of the Ordinance itself, the various interpretations of the Ordinance by the state trial courts, and the Florida Supreme Court's ruling on the breast portion of the Ordinance, this court is of the opinion that the Florida Supreme Court would interpret the buttocks portion of the ordinance to

> prohibit exposure of any portion of the buttocks. Further, the state's highest court would probably define the word "buttocks" to include the area at the rear of the body which lies between two imaginary lines running paraliel to the ground when a person is standing, the first or top such line drawn at the top of the cleavage of the nates and the second or bottom line drawn at the lowest visible point of this cleavage or the lowest point of the curvature of the fleshy protuberance, whichever is lower, and between two imaginary lines on each side of the body, which lines are perpendicular to the ground and to the horizontal lines described above, and which perpendicular lines are drawn through the point at which each nate meets the outer side of each leg. The Ordinance would be violated, therefore, if any portion of this area is visible from any vantage point. Since this is the "core meaning" which "persons of ordinary intelligence" would draw from the language of the Ordinance as it is written, the Ordinance is not impermissibly vague. See High Ol' Times v. Busbee, 673 F.2d 1225 (11th Cir. 1982) (Emphasis in the original)
>
> (Appendix D)

The District Court did not impose any sanctions upon Petitioners and at the close of the trial described the case as interesting in terms of both the law and facts. The Petitioners appealed from the ruling of the District Court dismissing the case.

On September 20, 1990, the Eleventh Circuit Court of Appeal issued its ruling denying relief to Petitioners, holding the appeal frivolous under Fed.R.App.P. 38, sua sponte and imposing sanctions of double costs and attorney fees for the appeal.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT'S DECISION UPHOLDING THE DAYTONA BEACH NUDITY, SEXUAL CONDUCT PROHIBITED ORDINANCE WHICH IS SELECTIVELY ENFORCED AGAINST PERFORMERS IS CONTRARY TO THE APPLICABLE DECISIONS OF THIS COURT.

As previously noted Daytona Beach Ordinance 5-25 as construed by the lower courts prohibits the exposure in establishments, including restaurants, hotels and fraternal meeting facilities where the consumption of alcoholic beverages is permitted, of any portion of the female breast directly or laterally below the top of the areolae and any portion of the buttocks, whether live or in the form of film or photograph. At trial Petitioners proved that the enactment was enforced in a discriminatory manner against establishments presenting exotic dancers as entertainment and not against the thousands of other violators at pool bars located at Daytona Beach hotels exposing prohibited portions of their breasts or buttocks. The Eleventh Circuit Court of Appeals found the selective (discriminatory) enforcement claim was entirely without purpose because Petitioners did not desire the ordinance to be enforced uniformly. Specifically the Eleventh circuit stated:

> Nor do the plaintiffs contend, on selective enforcement grounds, that criminal prosecutions against them should be dismissed; although the City did bring criminal charges against some of the plaintiffs, no charges are currently pending. Rather, the plaintiffs

> request a declaratory judgment that the City's selective enforcement is unconstitutional and an injunction preventing the City from selectively enforcing the ordinance against them.
>
> The district court held that the plaintiffs failed to prove a selective enforcement claim, but even if the plaintiffs could prove their claim, an injunction would not necessarily prevent the City from enforcing the ordinance against them. The court would enjoin the City not to enforce the ordinance against the plaintiffs **selectively**. The City could satisfy such a mandate simply by enforcing the ordinance against all similarly situated violators. Thus, even if the plaintiffs were to succeed on this selective enforcement claim, they would not escape the ordinance's application to them; they could only require the City to enforce it more widely--a result that is clearly not what the plaintiffs desire. (Emphasis supplied)
>
> (Appendix A)

In fact, the criminal prosecutions against Grier, Boido and Del Pinto had already been dismissed and they had requested an injunction so they would not be subject to additional arrests. Petitioners did desire the Ordinance to be enforced equally. The Eleventh Circuit ruling is contrary to numerous rulings of this Court discussing discriminatory enforcement.

The United States Supreme Court in Houston v. Hill, 482 U.S. 451(1987) considered a case where Mr. Hill requested similar relief in a civil case after his acquittal of the criminal charges. The United States Supreme Court stated:

> Houston's ordinance criminalizes a substantial amount of constitutionally protected speech, and

> accords the police unconstitutional discretion in enforcement. The ordinance's plain language is admittedly violated scores of times daily, App 77, yet only some individuals--those chosen by the police in their unguided discretion--are arrested. Far from providing the "breathing space" that "First Amendment freedoms need...to survive'", NAACP v. Button, 371 U.S. (1963), the ordinance is susceptible of regular application to protected expression. We conclude that the ordinance is substantially overbroad, and that the Court of Appeals did not err in holding it facially invalid.

An additional decision of this Court granting injunctive relief in a civil case due to the potential for arbitrary suppression of First Amendment liberties is Kolender v. Lawson, 461 U.S. 352 (1983). In footnote 15 of the decision the United States Supreme Court lists additional citations on the discriminatory enforcement issue. The footnote states:

> See,, e.g., Kolender v. Lawson, 461 U.S. 352, 360-361, 75 L.Ed.2d 903, 103 S.Ct. 1855 (1983) (identification requirement unconstitutional because it accords police "full discretion"); Smith v. Goguen, 415 U.S. 566, 575, 39 L.Ed.2d 605, 94 S.Ct. 1242 (1974) ("Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections; (thereby) entrusting lawmaking 'to the moment-to-moment judgment of the policeman on his beat'", quoting Gregory v. City of Chicago, 394 U.S.111, (Black, J., concurring); Papachristou v. City of Jacksonville, 405 U.S. 156, 170, 31 L.Ed.2d 110, 92 S.Ct. 839 (1972) (vagrancy ordinance "furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure'"), quoting Thornhill v. Alabama, 310 U.S. 88, 97-98, 84 L.Ed.1093, 60 S.Ct.736

(1940); Coates v. Cincinnati, 402 U.S.611, 611-616, 29 L.Ed.2d 2214, 91 S.Ct. 1686, 58 Ohio Ops 2d 481 (1971) (statute prohibiting "annoying" conduct "contains an obvious invitation to discriminatory enforcement"). Like many of the ordinances in these cases, Houston's effectively grants police the discretion to make arrests selectively on the basis of the content of the speech. Such discretion is particularly repugnant given "[t]he eternal temptation...to arrest the speaker rather than to correct the conditions about which he complains." Younger v. Harris, 401 U.S. 37,65, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971) (Douglas, J., dissenting).

The instant case does not involve merely an invitation to discriminatory enforcement but involves actual discriminatory enforcement. The District Court also found that the various officers differed in their opinions as what amount of exposure would result in arrest.

This Court should grant the Petition for Writ of Certiorari as the opinion of the Eleventh Circuit is directly contrary to the decisions of this Court concerning penal enactments which are or have the potential for discriminatory enforcement such as Houston v. Hill, supra, and Kolender v. Lawson, supra, and the numerous authorities cited therein.

II. THE ELEVENTH CIRCUIT OPINION APPROVING THE BROAD INTERPRETATION OF THE ORDINANCE WHICH PROHIBITS EXPOSURE OF ANY PORTION OF THE BUTTOCKS AND ANY PORTION OF THE FEMALE BREAST BELOW THE TOP OF THE AREOLAE, IRRESPECTIVE OF CONTEXT OR PERVASIVENESS, IS IN DIRECT

CONFLICT WITH DECISIONS OF THIS COURT.

In the instant case the District Court has improperly rejected the narrowing construction of the state Trial court on the buttocks issue and extrapolated the broadest meaning possible contrary to numerous decisions of the United States Supreme Court. In addition the federal courts have reaffirmed the position of the Florida Supreme Court rejecting the narrowing constructions of the lower courts and finding that the broadest construction would be adopted and therefore no portion of the female breast directly or laterally below the top of the areolae could be exposed.

The state trial court in cases involving Petitioners Grier and Del Pinto narrowly construed the buttocks prohibition finding:

> In construing an ambiguous statute it is proper to take into consideration the particular evils at which the legislation is aimed or mischief sought to be awarded (30 Fla. Jur., Page 203).
>
> The word buttocks by medical definition and common language is to say the least ambiguous for one cannot define the beginning or ending of that part of the anatomy. The evil sought to be avoided by this ordinance is nude dancing, not semi-nude dancing. To construe the ordinance to read partially exposed buttocks would place an unbridled discretion upon the Courts to determine how much of the buttocks should be partially exposed in order to find a violation of the ordinance.

It is therefore the interpretation of this Court that in order to find any person in violation of the ordinance, all of his or her buttocks must be exposed.

(Appendix E)

The District Court rejected the limiting construction and adopted the broadest construction possible stating:

> After consideration of the wording of the Ordinance itself, the various interpretations of the Ordinance by the state trial courts, and the Florida supreme Court's ruling on the breast portion of the Ordinance, this Court is of the opinion that the Florida supreme Court would interpret the buttocks portion of the ordinance to prohibit exposure of any portion of the buttocks. Further, the state's highest court would probably define the word "buttocks" to include the area at the rear of the body which lies between two imaginary line running parallel to the ground when a person is standing, the first or top such line drawn at the top of the cleavage of the nates and the second or bottom line drawn at the lowest visible point of this cleavage or the lowest point of the curvature of the fleshy protuberance, whichever is lower, and between two imaginary line on each side of the body, which lines are perpendicular to the ground and to the horizontal lines described above, and which perpendicular lines are drawn through the point at which each nate meets the outer side of each leg. The Ordinance would be violated, therefore, if any portion of this area is visible from any vantage point. Since this is the "core meaning" which "persons of ordinary intelligence" would draw from the language of the Ordinance as it is written, the Ordinance is not impermissibly vague. See High Ol' Times v. Busbee, 673 F.2d 1225 (11th Cir. 1982).
>
> (Appendix D)

The rejection of the construction of the state court violates several decisions of this Court. For example, in Houston v. Hill, supra, the Court stated:

> We have long recognized that trial court interpretations, such as those given in jury instructions, constitute "a ruling on a question of state law that is as binding on us as though the precise words had been written into the ordinance." Terminiello, 337 U.S., at 4, 93 L.Ed. 1131, 69 S.Ct. 894.

While it is true that the Florida Supreme Court had rejected the narrowing interpretation of the term below the top of the areolae in City of Daytona Beach v. Del Percio, 476 So.2d 197 (Fla. 1985), the buttocks construction remained undisturbed.

Ordinance 5-25 clearly on its face prohibits a wide range of expression in commercial establishments where liquor may be consumed, Schad v. Borough of Mt. Ephriam, 452 U.S. 61 (1981). In Schad the United States Supreme Court stated:

> Nor may an entertainment program be prohibited solely because it displays the nude human figure. "[N]udity alone" does not place otherwise protected material outside the mantle of the First Amendment. Jenkins v. Georgia, supra, at 161 41 L.Ed. 642, 94S.Ct. 2750; Southeastern Promotions, Ltd. v. Conrad, supra; Erznoznik v. City of Jacksonville, supra, at 211-212, 213 45 L.Ed.2d 125, 95 S.Ct. 2268. Furthermore, as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulation. Doran v. Salem Inn, Inc., supra;;

Southeaster Promotions, Ltd. v. Conrad, supra; California v. LaRue, supra.

The Schad decision makes clear that this ordinance which as construed prohibits all entertainment programs whether live or on film or by photograph due to exposure of even minimal portions of the female breast and human buttocks. The Eleventh Circuit was not concerned by the fact that the ordinance prohibited forms of attire that are socially acceptable and are regularly worn on the beaches. This is contrary to the United States Supreme Court opinion in Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) finding that an ordinance which sweepingly forbids display of films containing any covered buttocks or breast unconstitutional in violation of the First Amendment and Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) declaring unconstitutional an ordinance which makes criminal activities which are normally innocent.

The lower court's duty was to consider narrowing construction rather than rewriting the ordinance. In Virginia v. American Booksellers Assn., 484 U.S. 383 (1988) this Court stated:

> It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be "readily susceptible" to a narrowing construction that would make it constitutional, it will be upheld. Erznoznik v. City of Jacksonville, 422 U.S. 205, 45 L.Ed.2d 125, 95 S.Ct. 2268 (1975); Broadrick v. Oklahoma, 413 U.S. 601, 37 L.Ed.2d 830, 93 S.Ct. 2908 (1973). The key to application of this principle is

> that the statute must be "readily susceptible" to the limitation; we will not rewrite a state law to conform it to constitutional requirements.

While the ordinance if narrowly construed would apparently be constitutional under a Twenty-first Amendment analysis, see City of Newport v. Iacobucci, 479 U.S. 92 (1986), New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981) and California v. LaRue, 409 U.S. 109 (1972), the failure to narrowly construe the enactment violates the First Amendment at construed in Schad, supra, Erznoznik, supra, Hill, supra and Doran v. Salem Inn, Inc., 422 U.S. 922 (1975). The LaRue, decision stated in footnote 5:

> 5. Because of the posture of this case, we have necessarily dealt with the regulations on their face, and have found them to be valid. The admonition contained in the Court's opinion in Segram & Sons v. Hostetter, 384 U.S. 35, 52, 16 L.Ed. 336, 86 S.Ct. 1254 (1966), is equally in point here: "Although it is possible that specific future applications of [the statute] may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise. We deal here only with the statute on its face. And we hold that, so construed, the legislation is ccnstitutionally valid." (Emphasis supplied)

This case does contain specific applications and the problems should be considered.

Moreover, this Court recently granted certiorari in Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir.1990), cert. granted, Barnes v. Glenn Theater, ___ U.S. ___, 111 S.Ct. 90, 112 L.Ed.2d 15 (1990). The concurrence

at page 1101 indicates that nudity is so narrowly defined that a woman wearing tiny pasties and a g-string is considered clothed. This is similar to the definition in Iacobbucci prohibiting exposure of the pubic area, anus, vulva, genitals or the portion of the breast known as the areola, nipple or simulation thereeof. Petitioners do not argue that such a narrowly drawn prohibition is improper in a liquor licensed establishment but that the Ordinance construed in its broad terms as in this case is violative of the First Amendment.

The Eleventh Circuit's opinion is contrary to the principles set forth in Erznoznik, Schad, Papachristou and the other decisions of this Court cited herein and for that reason this Court should grant review. An additional reason for review is to clarify whether a penal ordinance enacted under the state's broad power to regulate alcohol sales under the Twenty-first Amendment which restricts rights of free expression should be narrowly construed.

III. THE IMPOSITION OF SANCTIONS UPON THE PETITIONERS WITHOUT ANY PRIOR NOTICE OR AN OPPORTUNITY TO BE HEARD IS IN DIRECT CONFLICT WITH THE DECISION OF THIS COURT IN ROADWAY EXPRESS, INC. V. PIPER, 447 U.S. 752 (1980).

Not only did the Eleventh Circuit deny Petitioners any relief but sanctions were imposed without notice or an opportunity to be heard. This case involves a unique factual record and in fact the district judge stated on the record that it was an interesting case in terms of the law and facts. In addition, County Court Judges Josephson (Appendix E) and McDermott (Appendix F) had granted relief by narrowly construing the ordinance, Circuit Judge Foxman had affirmed Josephson's order, Circuit Judge Smith also entered a favorable appellate ruling (Appendix G). In Del Percio v. City of Daytona Beach, 449 So.2d 323 (Fla. 5th DCA 1984) the Fifth District Court of Appeal found the ordinance "vague, overbroad, not fairly enforceable and thus unconstitutional" and in City of Daytona Beach v. Del Percio, 476 So.2d 197 (Fla. 1985) Chief Justice Boyd and Justice Atkins dissented stating the ordinance was unconstitutionally ambiguous and Justice Overton dissented stating the City should rewrité and enact a proper Ordinance. Based upon the law and the learned judges and justices who agreed with Petitioners' position in whole or

in part the arguments cannot be deemed frivolous. This case creates an intolerable chilling effect on all litigants desiring to distinguish their case from other unsuccessful but similar challenges by exposing them to sanctions without any due process of law.

In Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980), a case involving sanctions imposed against an attorney under 28 U.S.C., section 1927, this Court stated:

> The power of a court over members of its bar is at least as great as its authority over litigants. If a court may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial processes. See Renfrew, Discovery Sanctions: A Judicial Perspective, 67 Calif. L. Rev. 264 268 (1979). Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record. But in a proper case, such sanctions are within a court's powers. (Emphasis supplied)

In this case the District Court of Appeal imposed sanctions, sua sponte, without any notice or an opportunity to be heard. In Braley v. Cambell, 832 F.2d 1504 (10th Cir. 1987) a case involving sanctions imposed upon an attorney, the court en banc discussed the procedure for imposing sanctions. The court stated:

> In such a case, if a party has already made a motion or request in its brief that sanctions be imposed, and identified the party or counsel it wants to be sanctioned, the notice requirements are satisfied, so long as the court gives the person against whom

> sanctions are requested an opportunity to file a brief or otherwise be heard before imposing sanctions. See, e.g. Herzfeld, 769 F.2d at 647. On those occasions when the court intends to consider such sanctions sua sponte, due process is satisfied by issuance of an order to show cause why a sanction should not be imposed and by providing a reasonable opportunity for filing a response. See Van Sickle v. Holloway, 791 F.2d 1431, 1437 (10th Cir. 1986); see also Reliance, 792 F.2d at 1139

In Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987) Rule 11 sanctions were discussed. The Eleventh Circuit Court of Appeal stated that due process required that a party be given fair notice of the possible imposition of Rule 11 sanctions and of the reason for their imposition. In Donaldson the Eleventh Circuit noted that due process demanded more specific notice to a client than an attorney. The Court also found that the party to be sanctioned was entitled to an opportunity to respond.

The tendency of the court to impose sanctions without notice on unsuccessful litigants in the Circuit Court of Appeal has a drastic chilling effect on attorneys and litigants who desire to seek review. This is especially true in cases involving potentially unpopular issues such as adult entertainment. Sanctions should not be imposed lightly or without notice and an opportunity to be heard. The decision of the Eleventh Circuit is inconsistent with the decision of the United States Supreme Court in Piper and the Tenth Circuit in Braley v. Campbell and for that reason review should be granted.

CONCLUSION

Absent review by certiorari by this Court cities in the Eleventh Circuit may selectively and discriminately enforce broad enactments which restrict First Amendment rights in any commercial establishment where liquor is consumed. Potential litigants will be fearful to defend their position in court due to the clear and present danger of sanctions. This Court should grant the Writ of Certiorari to remove the chilling effect of the ruling of the Eleventh Circuit upon the presentation of disputes based upon the First Amendment in the Eleventh Circuit.

Dated: February 7, 1991

Respectfully submitted,

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Attorney for Petitioner

90-1269

Supreme Court, U.S.
FILED
FEB 7 1991
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1990

FUNCTION JUNCTION, INC., et al.,
Petitioners,

v.

PAUL CROWE, et al.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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APPENDIX A

Chris GEANEAS, Pink Pussycat, Inc, d/b/a Red Garter Club, Del Percio, Inc., d/b/a Shingle Shack, Function Junction, Inc., Dawn Boido, Denise Del Pinto, Leslie Grier, Plantiffs-Appellants,

Kinzey Enterprises, Inc., d/b/a Oyster Pub, Linnie Shiftlett, Lois Young, Plaintiffs,

v.

Charles W. WILLETS, The City of Daytona Beach, Defendants-Appellees,

John M. Power, Lawrence Kelly, Defendants.

No. 89-3308.

United States Court of Appeals, Eleventh Circuit.

September 10, 1990.

Appeal from the United States District Court for the Middle District of Florida

Before TJOFLAT, Chief Judge, TUTTLE, and RONEY* Senior Circuit Judges.

TJOFLAT, Chief Judge:

The plaintiffs in this case own or manage bars providing nude dancing, or work in those establishments as nude dancers or bartenders. They brought suit in federal

district court under 42 U.S.C. § 1983 (1988) claiming that a Daytona Beach ordinance, which prohibits exposure of certain body parts in establishments dealing in alcohol, violated their rights under the first and fourteenth amendments. The district court granted partial summary judgment for the defendants and, following a bench trial on the remaining issues, dismissed the plaintiffs' case. The plaintiffs appeal, and we affirm. We also hold that the plaintiffs' appeal is frivolous under Rule 38, Fed.R.App.P. 38.

I.

In 1981, the City of Daytona Beach enacted an ordinance prohibiting exposure of certain body parts in establishments dealing in alcoholic beverages.[1] Daytona Beach

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1 The ordinance provides as follows:

Section 5-25. Nudity, Sexual Conduct Prohibited.

(a) No person shall expose to public view his or her genitals, pubic area, vulva, anus, anal cleft or cleavage or buttocks or any simulation thereof in an establishment dealing in alcoholic beverages

(b) No female person shall expose to public view any portion of her breasts below the top of the areola or any simulation therof in an establishment dealing in alcoholic beverages

(c) No person maintaining, owning, or operating an establishment dealing in alcoholic beverages shall suffer or permit any person to expose to public view his or her genitals, pubic area, vulva, anus, anal cleft or cleavage or buttocks or any simulation thereof within the establishment dealing in alcoholic beverages.

(d) No person maintaining, owning, or operating an establishment dealing in alcoholic beverages shall suffer or permit any female person to expose to public view any portion of her breasts below the top of the areola or any simulation thereof within the establishment dealing in alcoholic beverages.

police then began enforcing the ordinance. They arrested dancers, including two plaintiffs in this case, at several "topless bars" for dancing partially nude in violation of the ordinance. They arrested bartenders and managers, including plaintiffs in

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> (e) No person shall engage in and no person maintaining, owning, or operating an establishment dealing in alcoholic beverages shall suffer or permit any sexual intercourse, masturbation, sodomy, beastiality [sic], oral copulation, flagellation, any sexual act which is prohibited by law, touching, caressing or fondling of the breasts, buttocks, anus or genitals or the simulation thereof within an establishment dealing in alcoholic beverages.
>
> (f) No person shall cause and no person maintaining, owning or operating an establishment dealing in alcoholic beverages sahll suffer or permit the exposition of any graphic representation, including pictures or the projection of film, which depicts human genitals, pubic area, vulva, anus, anal cleft or cleavage, buttocks, female breasts below the top of the areola, sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, any sexual act prohibited by law, touching, caressing or fondling of the breasts, buttocks, anus, or genitals, or any simulation thereof within any establishment dealing in alcoholic beverages.

Section 5-1 of the Code further provides.

> *Establishment dealing in alcoholic beverages.* Any business or commercial establishment (whether open to the public at large or where entrance is limited by cover charge or membership requirement) including those licensed by the state for sale and/or service of alcoholic beverages, and any bottle club; hotel; motel; restaurant; night club; country club; cabaret; meeting facility utilized by any religious, social, fraternal or similar organization; business or commercial establishment where a product or article is sold, dispensed, served or provided with the knowledge, actual or implied, that the same will be, or is intended to be mixed, combined with or drunk in connection or combination with an alcoholic beverage on the premises of said business or commercial establishment; or business or commercial establishment where the consumption or alcoholic beverages is permitted. A private residence, whether permanent or temporary in nature, is not an establishment dealing in alcoholic beverages.

this case, who were working at establishments when nude dancing arrests were made. They cited owners, including plaintiffs in this case, for permitting nude dancing in their establishment, and they ordered the owner of one establishment, a plaintiff here as well, to remove graphic photographs from his walls and to stop selling calendars featuring pictures of his exotic dancers.

In the prosecutions that followed, the state courts issued various interpretations of the ordinance. In the case of one of the dancers involved in the present action, the county court dismissed the charges against her,[2] holding that the ordinance's prohibition of exposed female breasts was overbroad and that the ordinance proscribed exposure of only the *entire* buttocks, and nothing less. In 1984, the state district court of appeal held the ordinance unconstitutional on grounds of vagueness and overbreadth. *See Del Percio v. City of Daytona Beach,* 449 So.2d 323 (Fla.Dist.Ct.App. 1984). A year later, the Florida Supreme Court reversed that court and upheld the ordinance as constitutional. *See City of Daytona Beach v. Del Percio,* 476 So.2d 197 (Fla.1985). The supreme court's decision in *Del Percio,* however, specifically addressed only the ordinance's prohibition on exposed breasts, which it defined as exposure of the breast below an imaginary line drawn across the top of the areolae. *See id.* at 200. The decision did not define the ordinance 's prohibition on exposed buttocks.

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2 The charges against the other plaintiffs here are no longer pending either.

In May 1983, the plaintiffs filed this section 1983 suit in federal district court. They claimed that the ordinance violated their right of free expression under the first amendment, and their rights to due process and equal protection of the law under the fourteenth amendment. Specifically, the plaintiffs claimed that the ordinance was overbroad and void for vagueness under the first amendment and that the City had selectively enforced the ordinance against "topless bars" in violation of the fourteenth amendment. The plaintiffs requested a declaratory judgment, injunctive relief, and damages.

On the defendant's motion for partial summary judgment, the district court held that the ordinance was constitutionally valid on its face. In the court's view, the ordinance was a valid exercise of the state's broad authority to regulate alcohol sales under the twenty-first amendment, and, in light of the Florida Supreme Court's decision in *Del Percio,* the ordinance was not unconstitutionally broad. The district court, however, like the Florida Supreme Court in *Del Percio,* addressed only the ordinance's proscription on exposed breasts. The district court also denied summary judgment on the defendant's affirmative defense that the *Del Percio* decision rendered the present case res judicata.[3]

The case then went to trial before the court on the remaining claims. The court held that, although the plaintiffs had proved they were singled out for prosecution, they had not

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3 The city does not raise this issue on appeal, and we therefore do not address it.

shown that this prosecution was invidious or conducted in bad faith. The court thus denied their claim. In addition, the court upheld the constitutionality of the ordinance's prohibition on exposed buttocks, rejecting the plaintiff's contention that the provision was impermissibly vague. The district court, therefore, dismissed the plaintiff's case. 715 F.Supp. 334.

On appeal, the plaintiffs attack the district court's decision on four grounds: they claim that (1) the district court erred in analyzing the ordinance under the twenty-first amendment rather that under the first amendment; (2) the court erred in denying the plaintiffs' claim that the ordinance's provisions were overbroad; (3) the court erred in denying the plaintiffs' void-for-vagueness claim; and (4) the court erred in denying the plaintiffs' selective enforcement claim. We hold that the plaintiffs' claims entirely lack merit. In addition, because the plaintiffs' contentions are no more than conclusory assertions, unsupported by argument or reason, we hold that this appeal is frivolous under Rule 38 and instruct the district court to award the appellee double costs and attorneys' fees for its appeal.

II.

A.

The plaintiffs claim that the district court erred in analyzing the ordinance under the twenty-first amendment

rather than under the first amendment.[4] Under the Florida Supreme Court's decision in *Del Percio* and existing United States Supreme Court and Eleventh Circuit precedent, this argument is clearly foreclosed.

In *Del Percio*, the court held that, as a matter of state law, "Florida municipalities...have the authority to exercise the regulatory power of the twenty-first amendment recognized in *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981)." 476 So.2d at 201. In *Bellanca*, the Supreme Court held that, although nude dancing implicates the first amendment, the states' broad powers under the twenty-first amendment to regulate alcohol outweigh any first amendment interest in nude dancing. 452 U.S. at 717, 101 S.Ct. at 2601 (quoting *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-33, 95 S.Ct. 2561, 2568, 45 L.Ed.2d 648 (1975); *see City of Newport, Ky. v. Iacobucci*, 479 U.S. 92, 915-96, 107 S.Ct. 383, 385, 93 L.Ed.2d 648 (1986); *Jorgenson v. County of Volusia*, 846 F.2d 1350, 1351 (11th Cir.1988); *Lanier v. City of Newton, Ala.*, 842 F.2d 253, 255 (11th Cir. 1988); *Fillingim v. Boone*, 835 F.2d 1389, 1394 (11th Cir.1988); *Del Percio*, 476 So.2d at 201. Following this established precedent, the district court in the present case

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[4] The twenty-first amendment provides, in pertinent part: " The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. 21.

The first amendment provides, in pertinent part: "Congress shall make no law...abridging the freedom of speech..." U.S. Const. amend. 1.

properly analyzed the ordinance under the twenty-first amendment and properly upheld it as a valid exercise of the City's broad twenty-first amendment powers.

The plaintiffs, moreover, fail directly to join issue with this precedent. Rather, they attempt to skirt this authority by observing that the City Code broadly defines the term "establishment dealing in alcoholic beverages," *see supra* note 1. The plaintiffs contend that, whereas the ordinances in *Bellanca* and its progeny regulated only establishments *licensed* to sell liquor, the ordinance in the present case is not limited to establishments licensed to sell alcohol but also applies to unlicensed establishments that permit alcohol consumption. Consequently, they argue, the ordinance is an exercise of the City's general police powers, which must be analyzed under the first amendment rather than under the twenty-first amendment.

The plaintiffs, however, provide no legal support for this argument, and they fail to address the string of Eleventh Circuit cases that have expressly analyzed virtually identical ordinances under the twenty-first amendment. The plaintiffs rely on this court's decision in *Leverett v. City of Pinellas Park*, 755 F.2d 1536 (11th Cir. 1985), a case that invalidated under the first amendment an ordinance prohibiting nude dancing in *"any* commercial establishment,': *id.* at 1540 n.2. Although the ordinance in the present case is not limited to licensed establishments like the ordinance in *Bellanca*, neither does it apply to *any* commercial establishment like the

ordinance in *Leverett*. Rather, the ordinance here falls in between these other two categories of regulation: it applies to establishments dealing in alcoholic beverages, and although such establishments are not necessarily licensed to sell alcohol, they must *deal* in alcoholic beverages. The regulation here thus has a definite nexus to alcohol.

Not only is *Leverett* factually inapplicable to the present case--a problem that the plaintiffs never address--but, in addition, a string of cases in this circuit has clearly foreclosed the plaintiffs' argument. The court in these cases has analyzed this intermediate category of regulation of protected expression by such an ordinance is incidental to the regulation of alcohol. *See, e.g., Lanier,* 842 F.2d at 256-57 (ordinance applies to "any business establishment...which sells, dispenses or otherwise allows the consumption of alcoholic beverages on the premises");[5] *Fillingim,* 835 F.2d at 1397 (ordinance prohibited "nude or semi-nude entertainment in any commercial establishment at which alcoholic beverages are, or are available to be, sold dispensed, consumed, possessed or offered for sale or consumption on the premises"); *see also Jorgenson v. County of Volusia,* 625 F.Supp. 1543 1547 (M.D.Fla.1986) (upholding ordinance identical to Daytona Beach ordinance).[6]

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5 In *Lanier,* the court upheld the ordinance as applied. The court expressly stated that it was not adopting the district court's holding that the ordinance "clearly was passed as an incident to the regulation of alcohol, and did not go beyond the bonds of the Twenty-first amendment." 842 F.2d at 257.

6 On appeal in *Jorgenson,* this court in an unpublished opinion reversed the district court for failure to provide the attorneys notice of

These cases obviously foreclose the plaintiffs' argument here, and the plaintiffs have made no attempt to distinguish them. Indeed, the plaintiffs' briefs even fail to cite *Fillingim* and *Jorgenson*.[7]

The plaintiffs also fail to address the Supreme Court's statement in *Ziffrin, Inc. v. Reeves* that "[w]ithout doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale or *possession*, irrespective of when or where produced or obtained," 308 U.S. 132, 138, 60 S.Ct. 163 167, 84 L.Ed. 128 (1939) (emphasis added). *Ziffrin* thus indicates that the City's twenty-first amendment power extends beyond licensed establishments and includes the power to regulate the "possession" of alcohol even outside of licensed establishments. In short, under established precedent, the plaintiffs' contention is entirely meritless.

The plaintiffs also attempt to argue that the ordinance implicates the first amendment under the overbreadth doctrine. The gist of the plaintiffs' "argument" appears in a two-sentence paragraph in their brief:

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sanctions. *See* 824 F.2d 9973 (11th Cir.1987). On remand, the district court reaffirmed the imposition of sanctions, and this court affirmed, *see* 846 F.2d at 1350.

[7] References to *Fillilngim* appear only in block quotation and in connection with the plaintiffs' selective enforcement claim.

We also observe that the district court in *Jorgenson* imposed Rule 11 sanctions on Eric Latinsky, the same attorney who represents the plaintiffs in this case, for failing to cite key cases (i.e. *Bellanca* and *Del Percio*) in his memorandum of law attacking the Volusia County ordinance.

> In general rigorous constitutional standards apply when the government attempts to regulate expression and precision of drafting and clarity of purpose are essential... The definition of establishment dealing in alcoholic beverages is not precisely drafted but includes many establishments without liquor licenses or which do not allow consumption on premises.

Charitably construed, this argument contends that the City's broad definition of "establishment dealing in alcohol" creates the possibility that the ordinance's application might, at the margins, extend beyond the limits of the City's twenty-first amendment powers. That is, the City might use the ordinance to prohibit nude dancing in a context where alcohol is not in fact consumed.[8] Such a use of the ordinance would presumably extend beyond the City's twenty-first amendment powers[9] and would implicate the first amendment as an exercise of the City's general police powers. The plaintiffs appear to be arguing that, because of this attenuated danger at the extreme margins of the ordinance's possible applications, *any* application of the ordinance--even an application to conduct at the ordinance's core--must be analyzed under the strict standards of the first amendment.

This argument, once fleshed out, is clearly frivolous. Not only do the plaintiffs fail to provide any legal support for

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8 Whether or not the ordinance would properly apply in such a situation, however, raises a question of state law, which the state courts have not yet had occasion to address.

9 Of course, the plaintiffs would somehow have to explain away, which they have not done, the Court's pronouncement in *Ziffrin that the states'* twenty-first amendment power includes the power to regulate the mere possession of alcohol.

such a contention, but the courts have carefully drawn the contours of the overbreadth doctrine to exclude exactly such claims. As the Supreme Court explained in *Broadrick v. Oklahoma:*

> Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court... A closely related principle is that constitutional rights are personal and may not be asserted vicariously... These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws... Constitutional judgments, as Mr. Chief Justice Marshall recognized, are justified only out of the necessity of adjudicating rights in particular cases between litigants brought before the Court...

413 U.S. 601, 610-11, 93 S.Ct. 2908, 2915, 37 L.Ed.2d 830 (1973) (citations omitted). Only a few limited exceptions to this rule exist, none of which the present case involves. For example, a statute may be susceptible to a facial overbreadth challenge if it threatens to chill protected speech in general. Even then, as the *Broadrick* Court stated, "[a]pplication of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the court sparingly and only as a last resort." *Id.* at 6113, 93 S.Ct. at 2916. As the Court discussed, the doctrine's applicability becomes more and more limited as the allegedly chilled expression "moves from 'pure speech' toward conduct and that conduct--even if

expressive--falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." *Id.* at 615, 93 S.Ct. at 2917.

The overbreadth doctrine clearly does not apply here. As we discuss above, there can be no doubt that the Daytona Beach ordinance constitutes a valid exercise of the City's twenty-first amendment power to ban nude dancing in bars. Such a proscription lies at the core of the City's powers under the twenty-first amendment. The plaintiffs'conduct in the present case, moreover, rests extremely close to this core. Whether or not the ordinance reaches to conduct at a distance from these core concerns, the plaintiffs clearly have no standing under *Broadrick* to challenge, on this basis, the ordinance's application to them. The plaintiffs' overbreadth argument lacks foundation.

As one last stab in support of their contention that the district court should have analyzed this case under the first amendment, the plaintiffs refer to a footnote in Justice Stevens' *Iacobucci* dissent, in which he suggested that "[s]ince the Twenty-first Amendment deals only with a State's power to regulate 'transportation or importation into' the State, it would have no effect on a Kentucky bar selling Kentucky Bourbon." 479 U.S. at 102 n. 7, 107 S.Ct. at 389 n. 7. Relying on this footnote, the plaintiffs claim that the twenty-first amendment does not apply in this case because the plaintiffs agreed to sell only instate liquor in their establishments. The district court

rejected this argument, observing that the plaintiffs cited no legal support for their contention other than the footnote in Justice Stevens'dissent.

Nor do the plaintiffs now provide any additional legal support for their position or offer any argument explaining the error of the district court's decision. They fail, moreover, to distinguish, let alone cite, legal authority that explicitly rejects their position. Based on a definitive review of the twenty-first amendment, Judge Melton of the Middle District of Florida concluded: "Certainly, the 'twenty-first amendment power over alcohol consumption is broad enough to embrace state power to zone strong sexual stimuli away from places where liquor is served,'...without being forced to distinguish between domestic and imported alcohol." *W.D.C., Inc. v. City of Jacksonville,* 710 F.Supp. 782, 789 (M.D. Fla.1989) (quoting L. Tribe, American Constitutional Law § 6-225, at 478 n. 15 92d ed. 1988)). As Judge Melton also observed, the ordinances at issue in *Iacobucci, Lanier,* and *Fillingim* made no distinction between in-state and out-of-state liquor. The plaintiffs' contention on this point is meritless as well.

B.

The plaintiffs next raise another variation of an overbreadth attack: they claim that the ordinance prohibits forms of attire that are socially acceptable and that are regularly worn on the beaches. They assert, for example, that a bar owner would violate the ordinance simply by showing a television newscast of people at the beach. In addition, they

argue that patrons wearing such generally accepted attire subject themselves to arrest for violating the ordinance once they enter an establishment dealing in alcohol. The district court rejected this claim, and we affirm.

With respect to the first argument, demonstrated by the newscast hypothetical, the plaintiffs have asserted no basis for challenging the City's broad powers to regulate alcohol under the twenty-first amendment. As we discuss, "the Amendment confers broad regulatory powers on the States," *Iacobucci*, 479 US. at 95, 107 S.Ct. at 385, and those broad powers outweigh the free speech interest in nude and semi-nude dancing, thus enabling the states to ban that conduct. The plaintiffs, however, fail to demonstrate any first amendment interest on the bar owners' part in allowing their patrons to wear revealing attire. If the City can exercise its twenty-first amendment power to ban conduct that implicates the first amendment, then it can certainly exercise that power to ban conduct that does not implicate the first amendment.

With respect to the plaintiffs' assertion that the ordinance violates their patrons' own right to wear revealing clothing, the plaintiffs lack standing to attack the ordinance on that basis. As we discuss above, the Supreme Court in *Broadrick* held that "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in situations not before the Court." 413 US. at 610, 93 S.Ct. at 2915. A party may bring such a

challenge only when the broad language of a regulation chills expression protected by the first amendment. The doctrine's application becomes more unlikely as the allegedly chilled expression "moves from 'pure speech' toward conduct and that conduct--even if expressive--falls within the scope of otherwise valid criminal laws." *Id.* at 615, 93 S.Ct. at 2917. Here, the chilled expression--the conduct of wearing revealing clothing--rests at a pronounced distance from the "pure speech" at the first amendment's core; in fact, this conduct does not implicate the first amendment at all and no one contends otherwise.[10] In addition, this conduct falls within the scope of the City's otherwise valid ordinance proscribing exposure of certain body parts in establishments dealing in alcohol.[11] These circumstances, obviously, justify no exception to the traditional rules of standing articulated in *Broadrick*. We thus hold that the district court properly rejected this overbreadth claim.

C.

The plaintiffs also attack the district court's decision to deny their void-for-vagueness claim. The plaintiffs contend that the ordinance is unconstitutionally vague in defining the

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10 The plaintiffs claim only that the conduct implicates a liberty interest under the fourteenth amendment.

11 As the district court reasoned, even if this conduct implicates a liberty interest under the fourteenth amendment, that liberty interest would be entitled to no greater deference than the free speech interest in nude dancing under the first amendment. Because the City's power under the twenty-first amendment outweighs that free speech interest, it would also outweigh this liberty interest. The ordinance would remain a valid exercise of the City's twenty-first amendment powers.

prohibition on exposed breasts and the prohibition on exposed buttocks. By way of argument, the plaintiffs assert that various Florida state courts have interpreted these provisions differently and that this proliferation of interpretations demonstrates the ordinance's vagueness.

In pointing to the various judicial interpretations of this ordinance, however, the plaintiffs fail to mention that the Florida Supreme Court in *Del Percio* and the district court in this case defined these two provisions. With respect to the ordinance's prohibition on exposure of breasts, the Florida Supreme Court in *Del Percio* held that the provision meant that "no portion of the breast directly or laterally below the top of the areola may be exposed to public view." 476 So.2d at 200. In granting partial summary judgment, the district court held that the *Del Percio* court's construction was clear and thus rejected the plaintiffs' void-for-vagueness claim regarding this provision.

With respect to the ordinance's proscription on exposure of buttocks, the district court in its final decision acknowledged that the provision was somewhat vague. The court observed that the ordinance did not specify "whether the entire buttocks, or what portion thereof, must be covered" and that the ordinance did not define the word 'buttocks.'" 715 F.Supp. at 337. The court, however, concluded that the provision was not *"unconstitutionally"* vague, that is, it was "not 'impermissibly vague in all of its applications.'" *Id.* (quoting *Village of Hoffman Estates v. Flipside, Hoffman*

Estates, Inc., 445 U.S. 489, 495-95, 102 S.Ct. 1186, 1191, 71 L.Id..2d 362 (1982). Although the Florida Supreme Court had not addressed the provision at issue, the district court was able to "extrapolate [the ordinance's] allowable meaning." *See Grayned v. City of Rockford*, 408 U.S. 104, 110,92 S.Ct. 2294, 2300, 33 L.Ed.2d 222 (1972) (quoting *Garner v. Louisiana*, 368 U.S. 157, 174, 82 S.Ct. 248, 257, 7 L.Ed.2d 207 (1961) (Frankfurter, J., concurring)). The court decided that the Florida Supreme Court would interpret the ordinance to "prohibit exposure of *any portion* of the buttocks." 715 F.Supp. at 339. The court then determined that the Florida Supreme Court would define "buttocks" to include:

> the area at the rear of the body which lies between two imaginary lines running parallel to the ground when a person is standing, the first or top such line drawn at the the top of the cleavage of the nates [i.e., the prominence formed by the muscles running from the back of the hip to the back of the leg] and the second or bottom line drawn at the lowest visible point of this cleavage or the lowest point of the curvature of the fleshy protuberance, whichever is lower, and between two imaginary lines on each side of the body, which lines are perpendicular to the ground and to the horizontal lines described above, and which perpendicular lines are drawn through the point at which each nate meets the outer side of each leg. The Ordinance would be violated, therefore, if any portion of this area is visible from any vantage point.

Id. at 339.

On appeal, however, the plaintiffs fail entirely to mention, let alone critique, these discussions of the ordinance.

The plaintiffs fail to explain how the ordinance remains vague, let alone *unconstitutionally* vague, in light of the Florida Supreme Court and the district court's statements. Those statements, in our view, are persuasive. The plaintiffs are merely groping in the dark. Accordingly, we reject the void-for-vagueness attack and affirm the district court's decision on that issue.

D.

Finally, the plaintiffs claim that the district court erred in denying their selective enforcement claim. The plaintiffs contend that the City of Daytona Beach has enforced the statute only against "topless bars" and not against other, similarly situated establishments dealing in alcohol but not providing nude dancing. According to the plaintiffs, this selective enforcement violates their right to equal protection under the fourteenth amendment. The district court analyzed this claim under the two-part selective enforcement standard set out in *Fillingim and Lanier*. The court held that, although the plaintiffs had demonstrated under the standard's first element that they were singled out for prosecution among others who were similarly situated, the plaintiffs had not satisfied the standard's second requirement that this selection was invidious or in bad faith. 715 F.Supp. at 340. Again, the plaintiffs on appeal fail even to state, let alone to demonstrate, how the district court's conclusion is erroneous. That failure alone renders their appeal frivolous, but we find a more fundamental problem with this claim as well.

A selective enforcement claim generally arises in the criminal context, when a defendant challenges the enforcement of a criminal statute or ordinance against him. In that context, the defendant does not claim that the ordinance itself is invalid; rather, the defendant attacks the *prosecution* against him pursuant to that ordinance. The defendant bases his attack on the grounds that the prosecution against him constitutes a selective enforcement and thus violates his right to equal protection under the fourteenth amendment. If the court decides to grant the defendant relief, then it dismisses the criminal indictment against the defendant. The court, however, does not strike down the statute itself: the selective enforcement claim challenges the manner in which the state enforces the statute, and not the statute itself.

In the present case, the plaintiffs bring a selective enforcement claim in the civil context. Just as in the criminal context, this selective enforcement claim provides no basis for the court to invalidate the City ordinance: a selective enforcement claim challenges the enforcement of the ordinance and not the ordinance itself. Nor do the plaintiffs contend, on selective enforcement grounds, that criminal prosecutions against them should be dismissed: although the City did bring criminal charges against some of the plaintiffs, no charges are currently pending. Rather, the plaintiffs request a declaratory judgment that the City's selective enforcement is

unconstitutional and an injunction preventing the City from selectively enforcing the ordinance against them.[12]

The district court held that the plaintiffs failed to prove a selective enforcement claim, but even if the plaintiffs could prove their claim, an injunction would not necessarily prevent the City from enforcing the ordinance against them. The court would enjoin the City not to enforce the ordinance against the plaintiffs *selectively*. The City could satisfy such a mandate simply by enforcing the ordinance against all similarly situated violators. Thus, even if the plaintiffs were to succeed on this selective enforcement claim, they could not escape the ordinance's application to them; they could only require the City to enforce it more widely--a result that is clearly not what the plaintiffs desire.

As this discussion demonstrates, the plaintiffs' selective enforcement claim is entirely without purpose. In the context of this civil suit, such a claim is an inappropriate basis for the relief sought by the plaintiffs. We therefore affirm the district court's disposition of this claim as well.

III.

For the forgoing reasons, we hold that the plaintiffs' contentions are wholly meritless and therefore AFFIRM the

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12 In *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930, 95 S.Ct. 2561, 2567, 45 L.Ed.2d 648 (1975), the Supreme Court held that the *Younger* abstention doctrine, *see Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), did not apply when a plaintiff requested an injunction of *future* state criminal prosecutions. The doctrine of course applies when a state criminal prosecution is pending.

district court's disposition in this case. In addition, because the plaintiffs' claims are entirely without merit, we hold under Rule 38 that this appeal is frivolous and that plaintiffs be assessed double costs and attorneys' fees for this appeal. The Clerk of this Court shall fix the double costs, and the District Court on receipt of our mandate, shall determine the amount of the defendants' attorneys' fees for this appeal.

IT IS SO ORDERED.

APPENDIX B

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV - 9 1990
MIGUEL J. CORTEZ
CLERK

No. 89-3308

CHRIS GEANEAS, PINK PUSSYCAT, INC., d/b/a Red Garter Club, DEL PERCIO, INC., d/b/a Shingle Shack, FUNCTION JUNCTION, INC., DAWN BOIDO, DENISE DEL PINTO, LESLIE GRIER,

Plaintiffs-Appellants,

KINZEY ENTERPRISES, INC., d/b/a Oyster Pub, LINNIE SHIFTLETT, LOIS YOUNG,

Plaintiffs,

versus

CHARLES W. WILLETS, THE CITY OF DAYTONA BEACH,

Defendants-Appellees,

JOHN M. POWER, LAWRENCE KELLY,

Defendants.

On Appeal from the United States District Court for the Middle District of Florida

(November 9, 1990)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion September 10, 1990, 11th Cir., 1990, ____F.2d____).

Before: TJOFLAT, Chief Judge, TUTTLE, and RONEY*, Senior Circuit Judges.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42
(9/90)

*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

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APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CHRIS GEANEAS, et al	)	
	)	
Plaintiffs ,	)	
	)	
v.	)	Case No. 83-344-Civ-Orl-11
	)	
CHARLES W. WILLETS, et al	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This cause is before the Court upon Defendants' Motion for Partial Summary Judgment, filed March 16, 1987, the Memorandum of Law filed therewith in support of the Defendants' Motion, Plaintiffs' Motion for Partial Summary Judgment, filed April 10, 1987, the Memorandum of Law filed therewith in opposition to the Defendants' Motion and in support of the Plaintiffs' Motion, and the Defendants' Opposition to the Plaintiffs' Motion, filed April 23, 1987. The Court has reviewed the following documents, filed in relation to the motions, and the exhibits to which they refer: the Affidavits of Chris Geaneas and Leonard Del Percio filed in opposition to the Defendants' Motion and in support of the Plaintiffs' Motion, filed with the Plaintiffs' Memorandum of Law on April 10, 1987; the Supplemental Affidavit of Leonard Del Percio in support of the Plaintiffs' Motion, filed May 11, 1987; Plaintiffs' Notice of Supplemental Authority, filed June 25, 1987; Defendants' Notice of Supplemental Authority, filed June 29, 1987; Plaintiffs' Response to Court Order of September 18, 1987, Pertaining to Motions for Summary Judgment, filed October 5, 1987 and the documents referenced therein; Plaintiffs' Notice of Filing exhibits, filed October 5, 1987, and the Memorandum of Law filed therewith; Defendants' Supplemental Response to Plaintiffs' Motion for Summary Judgment, filed October 7, 1987; the Joint

Stipulation filed by the parties in reference to the Plaintiffs' Motion for a Preliminary Injunction, filed October 27, 1987[1] and the Defendant's Notice of Supplemental Authority, filed November 12, 1987.

The Motions for Summary Judgment were taken under advisement following the Court's Order of September 18, 1987.

BACKGROUND

This is an action brought primarily under 42 U.S.C. 1983 for damages and for declaratory and injunctive relief. At issue is Daytona Beach Ordinance 81-334, enacted on October 21, 1981, codified as City of Daytona Beach Code section 5-25, which prohibits certain kinds of nudity and sexual behavior, and the simulation and graphic depiction thereof, in an establishment dealing in alcoholic beverages.[2] An

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[1] Although this stipulation was filed in reference to the Plaintiffs' Motion for a Preliminary Injunction, at the hearing on the preliminary injunction the parties represented to the Court that they would have no objection to the use of the Joint Stipulation in deciding the cross motions for summary judgment. Furthermore, the Joint Stipulation provides that the parties did not limit the Joint Stipulation to the issues raised in the Motion for a Preliminary Injunction.

[2] In its entirety, Section 5-25 (created by Ordinance 81-334) reads:

Section 5-25. Nudity, Sexual Conduct Prohibited.

(a) No person shall expose to public view his or her genitals, pubic area, vulva, anus, anal cleft or cleavage or buttocks or any simulation thereof in an establishment dealing in alcoholic beverages.

establishment dealing in alcoholic beverages is broadly defined

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(b) No female person shall expose to public view any portion of her breasts below the top of the areola or any simulation thereof in an establishment dealing in alcoholic beverages.

(c) No person maintaining, owning, or operating an establishment dealing in alcoholic beverages shall suffer or permit any person to expose to public view his or her genitals, pubic area, vulva, anus, anal cleft or cleavage or buttocks or any simulation thereof within the establishment dealing in alcoholic beverages.

(d) No person maintaining, owning, or operating an establishment dealing in alcoholic beverages shall suffer or permit any female person to expose to public view any portion of her breasts below the top of the areola or any simulation thereof within the establishment dealing in alcoholic beverages.

(e) No person shall engage in and no person maintaining, owning or operating an establishment dealing in alcoholic beverages shall suffer or permit any sexual intercourse, masturbation, sodomy, beastiality [sic], oral copulation, flagellation, any sexual act which is prohibited by law, touching, caressing or fondling of the beasts, buttocks, anus or genitals or the simulation thereof within an establishment dealing in alcoholic beverages.

(f) No person shall cause and no person maintaining, owning or operating an establishment dealing in alcoholic beverages shall suffer or permit the exposition of any graphic representation, including pictures or the projection of film, which depicts human genitals, pubic area, vulva, anus, anal cleft or cleavage, buttocks, female breasts below the top the areola, sexual intercourse, masturbation, sodomy, beastiality [sic], oral copulation, flagellation, any sexual act prohibited by law, touching, caressing or fondling of the breasts, buttocks, anus, or genitals, or any simulation thereof within any establishment dealing in alcoholic beverages.

as almost any establishment where alcoholic beverages are sold or consumed.[3] Together, these ordinances have broad reach in terms of both establishments covered and activities prohibited. Plaintiffs assert that ordinance 81-334 is so overbroad that it restricts the exercise of First Amendment freedoms, rendering it constitutionally infirm. Plaintiffs further claim that the ordinance violates the First and Fourteenth Amendments in that it is vague, is being selectively enforced, and is preempted by certain Florida Statutes.

Plaintiffs are a varied collection of individuals and corporations. The three corporations involved,[4] (the Corporate Plaintiffs) (1) Pink Pussycat, Inc., d/b/a the Red Garter club,

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[3] City of Daytona Beach Code section 5-1 reads in pertinent part:

Section 5-1 Definitions.

...

Establishment dealing in alcoholic beverages. Any business or commercial establishment (whether open to the public or where entrance is limited by cover charge or membership requirement) including those licensed by the state for the sale and/or service of alcoholic beverages, and any bottle club: hotel; motel; restaurant; night club; country club; cabaret; meeting facility utilized by any religious, social, fraternal or similar organization; business or commercial establishment where a product or article is sold, dispensed, served or provided with the knowledge, actual or implied, that the same will be, or is intended to be mixed, combined with or drunk in connection or combination with an alcoholic beverage on the premises of said business or commercial establishment; or business or commercial establishment where the consumption or alcoholic beverages is permitted. A private residence, whether permanent or temporary in nature, is not an establishment dealing in alcoholic beverages.

[4] Initially a fourth corporation, Kinzey Enterprises, Inc. d/b/a Oyster Pub, was involved. This party was voluntarily dismissed in a Court Order filed July 27, 1983.

(2) Del Percio, Inc. d/b/a the Shingle Shack, and (3) Function Junction, Inc., are establishments which at one time, that is before section 5-25 was enacted, served alcohol in connection with topless dancing by female entertainers. All are Florida corporations doing business in Daytona Beach, Florida. Plaintiff Chris Geaneas is the owner and operator of Pink Pussycat, Inc., d/b/a the Red Garter Club. The remainder of the Plaintiffs were during relevant periods employees of the Corporate Plaintiffs (the Employee Plaintiffs). Plaintiffs Dawn Boido (a bartender) and Leslie Grier (a dancer) were arrested for violating section 5-25 while acting as employees of Del Percio, Inc. d/b/a the Shingle Shack. Plaintiffs Denise Del Pinto (a dancer) and Linnie Shiftlett (a bartender) were arrested for violating section 5-25 while acting as employees of Plaintiff Pink Pussycat, Inc. d/b/a the Red Garter Club. Plaintiff Lois Young (a dancer) was similarly arrested for violating section 5-25 while performing at the Function Junction, Inc.

Defendants are the City of Daytona Beach, Charles W. Willets, the Chief of Police of Daytona Beach, and John M. Power, an individual police officer of that city.

Plaintiffs initially filed their complaint on May 9, 1983. They sought a temporary restraining order, a preliminary injunction, a permanent injunction, a declaratory judgment, and money damages from the Defendants. However, because of a variety of state court proceedings then extant[5] this Court, per

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[5] On the date of the stay, each of the corporate plaintiffs involved in this case was party to a state court declaratory judgment action seeking

Judge Reed, stayed this case on July 27, 1983. After the termination of the state court proceedings at issue,[6] the stay was vacated by Order of this Court on July 1, 1986.

This cause is now before the Court upon the parties' cross motions for partial summary judgment. The Defendants seek summary judgment on two grounds: (1) that this action is, at least in part, barred by the res judicata and collateral estoppel effect of the decision of the Florida Supreme Court in City of Daytona Beach v. Del Percio, 476 So. 2d 197 (Fla. 1985); and (2) that the ordinance is facially constitutional, both in terms of overbreadth and vagueness. Plaintiffs contend to the contrary that the ordinance is both unconstitutionally overbroad and vague. After careful consideration the Court has determined that the present state of the record does not indicate that the

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an interpretation of the ordinance as it might apply to semi-nude dancers. Each of the individual Plaintiffs in this action, except Chris Geaneas, were involved as defendants in state court criminal enforcement proceedings (then on appeal). See the Court's Order of July 27, 1983.

[6] Plaintiff's represented in their two Motions to vacate the stay that the state court proceedings had terminated. Apparently the declaratory judgment action was dismissed for want of prosecution. See Plaintiff's Motion to Vacate Stay, filed November 25, 1985. The criminal proceedings against the five individual defendants were, according to the Plaintiffs, voluntarily dismissed. Id. The disposition of those proceedings is not of primary importance to this case in its current posture.

Of more importance are the criminal proceedings against Leonard Del Percio and Laura Iris Moore, who are nominally not parties in this case. Those criminal proceedings terminated in a decision by the Florida Supreme Court on October 28, 1985, which upheld parts of section 5-25 against claims that it was vague and overbroad. See city of Daytona Beach v. Del Percio, 476 So. 2d 197 (Fla. 1985).

Defendants are entitled to summary judgment on the res judicata issue, but that, on the merits, the ordinance is facially constitutional, entitling the Defendants to partial summary judgment as a matter of law.

RES JUDICATA

While this case was formerly stayed in deference to a variety of state proceedings, Defendants raise herein only the decision of the Florida Supreme Court in Del Percio as res judicata, barring this action. Del Percio arose out of criminal prosecutions against two defendants, Leonard Del Percio and Laura Iris Moore, for violations of section 5-25. Neither of these individuals is a party to this case. However, Leonard Del Percio was and is President of two of the Corporate Plaintiffs, Del Percio, Inc., and Function Junction, Inc., involved in this action. Furthermore, Defendant relies on the opinion of the Florida Supreme Court for the proposition that Laura Iris Moore was when arrested a bartender at Plaintiff Pink Pussycat, Inc. d/b/a a Red Garter Club. Because of the close relations of the parties in Del Percio with the parties in this case, and the similarity of issues involved, Defendant contends that this action is barred by the principles of res judicata.

Defendants are not entitled to summary judgment on this ground. Defendants make two separate arguments that partial summary judgment should be granted based on res judicata. First, Defendants contend that under the federal law of preclusion as expressed in Montana v. United States, 440

U.S. 147 (1979), Plaintiffs in this action are collaterally estopped from asserting that section 5-25 is unconstitutional by the result in Del Percio. Montana held that a nonparty to a prior suit who assists in the prosecution or defense of that action in aid of his own interest is as much bound by the result as if he had been a party of record.[7] Defendants contend that because Leonard Del Percio was a party to Del Percio, the two corporations of which he is President should be bound, as should their employees. Similarly, Defendants contend that Laura Iris Moore, the other defendant in Del Percio, was in actuality the "manager" of Pink Pussycat, Inc. d/b/a the Red Garter Club, and so it is also appropriate to bind that club, its president Plaintiff Chris Geaneas, and the club's employees to the result of Del Percio. Since section 5-25 was held to be constitutional by the Florida Supreme Court in that case, Defendants claim this action is barred in part.

Assuming arguendo that Montana is applicable,[8] the Defendants have not demonstrated that they are entitled to

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[7] Montana gleaned from the federal cases a four part standard designed to determine whether it is appropriate to bind nonparties to the result of a prior litigation. First, the nonparty must have been sufficiently involved in the conduct of the prior litigation to actuate principles of estoppel. Second, the issue involved must be the same in substance. Third, the controlling facts and law must not have changed significantly. Fourth, other special circumstances must not warrant an exception to the general rule. 440 U.S. at 154-155.

8 Montana created a federal rule by examining federal cases. However, a variety of recent Supreme Court cases have held that the full faith and credit statute, 28 U.S.C. 1738, requires that the preclusive effect of a state court judgment be determined under the law of the state which

summary judgment thereunder. The first part of the Montana test is that the nonparty must have been sufficiently involved in the conduct of the prior litigation to actuate principles of estoppel. 440 U.S. at 155[9] This is clearly a question of fact for the Court. Astron Industrial Associated, Inc. v. Chrysler Motor Corp., 405 F.2d 958, 961 (5th Cir. 1968); C. Wright, A. Miller & E. Cooper, 18 Federal Practice and Procedure 4451, at 429-430 & n. 7 (1981). The Defendants have not sufficiently proven control of the defense in Del Percio by the Corporate

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rendered the judgment. E.g., Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 105 s. Ct. 1327, 1331-1335 (1985); Migra v. Warren City School District Board of Education, 465 U.S. 75, 81-84 (1984); Allen v. McCurry, 449 U.S. 90, 96-105 (1980). But see DeWeese v. Town of Palm Beach, 688 F.2d 731, 733 (11th Cir. 1982) (in a decision subsequent to Allen, the Eleventh Circuit applied federal law to determine the collateral estoppel effect of a state court criminal judgment in a later federal action brought under 42 U.S.C. § 1983). These cases in the main address the question of whether a particular claim or issue is precluded by the state court judgment, and not whether a particular party is bound. However, their rationale applies equally well to the latter question.

Since the prior judgment at issue in Montana was a state court judgment, and its preclusive effects were determined under federal law, there exists a latent conflict between that decision and the later decisions cited above. Montana may be distinguishable since it involved the preclusive effects of a judgment as to the United States. Traditionally special rules of res judicata and collateral estoppel are applied to the United States. See e.g., United States v. Mendoza, 464 U.S. 154 (1984) (doctrine of nonmutual offensive collateral estoppel does not apply the United States). However, neither party has briefed this issue in any manner, and so the Court will not closely examine it. The question need not be reached since the Court concludes that the Defendants have not demonstrated their entitlement to summary judgment under state or federal law.

[9] See supra, note 7.

Plaintiffs to justify preclusion even as to them.[10] No real evidence of actual control has been presented to the Court. Rather, the Defendants rely on the positions and employment of the various Plaintiffs to argue that the Corporate Plaintiffs must have controlled the defense in Del Percio.[11] The positions and employment of the defendants in Del Percio do not create a sufficiently strong inference of control to justify summary judgment. See Ransburg Lectro-Coating Corp. v. Lansdale Finishers, Inc., 484 F.2d 1037, 1038 (3rd Cir. 1973) (reversing a district court's granting of summary judgment where the movant failed to affirmatively establish sufficient control). Cf. Concordia v. Bendekovic, 693 F.2d 1073, 1076 (11th Cir. 1982) (burden on the movant to introduce evidence sufficient to establish defense of res judicata).

Defendants' second argument is that these parties are precluded from bringing this suit by Florida law on res judicata and collateral estoppel.[12] Defendant cites Seaboard Coast Line

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[10] Therefore the Court does not reach the question of whether a collateral estoppel bar to the Corporate Plaintiffs would also be a bar to their employees.

[11] For example, the Defendants argue: "... [I]t would be naive to assume that Moore brought her case all the way to the State Supreme Court without any involvement by her employer, since the employer would have received the primary benefit from a favorable ruling - that is, to operate a topless bar." Defendants' Memorandum of Law, p.6. Naive as the Court may be, it will not assume that Moore's employer was involved without any evidence to that effect. A fortiori, the court will not find that Moore's employer controlled the Del Percio litigation.

[12] Florida law on preclusion is said to be applicable since a Florida court rendered the judgment alleged to have preclusive effect. See supra note 8.

Railroad Co. v. Industrial Contracting Co., 260 so. 2d 860 (Fla. 4th DCA 1972) for the proposition that nonparties to a prior litigation can be held to be parties under certain circumstances. In this respect, the case is similar to Montana. Furthermore, as in Montana, the question of nonparty control (here called "privity") is one of fact for the trial court. Seaboard, 260 So. 2d at 864 (citing Astron Industrial Associates, 405 F.2d at 961). As discussed above, the evidence is insufficient to establish the requisite level of involvement necessary to treat these Plaintiffs as parties to Del Percio.

Defendants also cite Atlantic Cylinder Corp. v. Hetner, 438 So. 2d 922 (Fla. 1st DCA 1983), review denied, 447 So. 2d 885 (1984), for the proposition that a corporation and one of its corporate officers should (be) treated as the same party for res judicata and collateral estoppel purposes. In Atlantic Cylinder the plaintiff had formerly brought suit against a corporation, and was partially successful and partially unsuccessful. Then that plaintiff brought suit against several corporate officers for the same conduct. The court held that the former judgment on the merits for the corporation barred a subsequent action against the corporate officers to the extent that it seeks "... to relitigate issues adversely determined on the previous action." Id., at 923. However, at issue in Hetner was the allegedly tortious conduct of the officers. As such, the court

relied heavily on notions of respondent superior and joint tortfeasor liability. These doctrines could be extended to the present case, which concerns criminal liability, but neither party has sufficiently briefed the issue for the Court to be able to determine whether such an action would generally be in accord with Florida Law. Therefore the Court will not grant summary judgment based on collateral estoppel or res judicata.

FACIAL CONSTITUTIONALITY

Defendants' second ground for summary judgment is that section 5-25 is wholly constitutional on its face. They contend that the ordinance regulates nudity in conjunction with the regulation of alcoholic beverages, and therefore the ordinance must be reviewed deferentially given the "'added presumption in favor of the validity of state regulation' conferred by the Twenty-first Amendment, ..." New York State Liquor Authority v. Bellanca, 452 U.S. 714, 718 (1981), citing, California v. LaRue, 409 U.S. 109, 118 (1972).

The Plaintiffs assert to the contrary that the ordinance is unconstitutional on its face because it is overbroad and vague. They contend that section 5-25 must be strictly reviewed, because it regulates conduct in all establishments "dealing in" alcoholic beverages, as opposed to those establishments licensed to serve alcoholic beverages. Plaintiffs argue that only the latter are reviewed under the Twenty-first Amendment.

Twenty-first Amendment Authority

Plaintiffs contend, inter alia, that the statute restricts exercise of their first amendment rights.[13] Nude dancing is not without its first amendment protection. Schad v. Borough of Mount Ephriam, 452 U.S. 61, 66 (1981); Krueger v. City of Pensacola, 759 F.2d 851, 854 (11th Cir. 1985). However, the Supreme Court has held that states may regulate nude entertainment under their broad powers, conferred by the Twenty-First Amendment, to regulate the sale of liquor. E.g., Bellanca, 452 U.S. at 717. The states' power to regulate pursuant to the Twenty-First Amendment outweighs any first amendment protection afforded to nude entertainment. Id.

In order to review an ordiance which restricts protected expression under the less strict standard of the Twenty-first Amendment, two requirements must be met. First, the legislative body must have been delegated the state's Twenty-first Amendment authority to regulate behavior in conjunction

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[13] Plaintiffs also attempt to assert the First Amendment rights of patrons whose dress is regulated by the ordinance. To the extent that the defendants are entitled to raise these claims, the First Amendment interest of patrons in their dress is no more, and almost certainly less, than that of nude dancers who can claim some element of expression in their attire, or lack thereof. See, South Florida Free Beaches, Inc. v. City of Miami, 734 F. 2d 608, 610 (11th Cir. 1984) (nude sunbathing is not protected by the First Amendment). Accordingly, even if Plaintiffs can raise the claims of patrons, those claims present a weaker case for overturning the ordinance than claims of the Plaintiffs.

with the regulation of alcohol. Second, the regulation of expression must actually be incidental to the regulation of alcohol. These requirements are discussed below.

With respect to the first question, in Florida, municipalities such as Daytona Beach are authorized to exercise the power conferred by the Twenty-first Amendment. The Florida Supreme Court held in Del Percio that, as a matter of state law, municipalities have Twenty-first Amendment authority to regulate behavior in "bars" despite the fact that they lack the power to totally ban liquor sales. 476 So. 2d at 201. Such allocation is clearly permissible under the Twenty-First Amendment:

> ... [T]his court has never attached any constitutional significance to a State's division of its authority over alcohol. The Twenty-first Amendment has given broad power to the States and generally they may delegate this power as they see fit.
>
> There is certainly no constitutional requirement that the same governmental unit must grant liquor licenses, revoke licenses, and regulate the circumstances under which liquor may be sold."

City of Newport v. Iacobucci, ___ U.S. ___, 107 S. Ct. 383, 385 (1986) (footnote omitted). The Eleventh Circuit has recognized this delegation of power. International Food & Beverage Systems v. City of Fort Lauderdale, 794 F.2d 1520, 1527 (11th Cir. 1986). Thus, the City of Daytona Beach has the Twenty-first Amendment authority to regulate behavior as an incident to the regulation of alcohol.

Plaintiffs cite several Eleventh Circuit cases for the proposition that an ordinance such as section 5-25 must be

reviewed under a stricter standard than that employed in Bellanca. Because the ordinance restricts the exercise of a fundamental right, Plaintiffs contend that the court must strictly review the ordinance under First Amendment standards, such as those set out in Leverett v. City of Pinellas Park, 775 F.2d 1536 (11th Cir. 1985), Krueger, 759 F.2d at 855-856, and Grand Faloon Tavern, Inc. v. Wicker, 670 F.2d 943 (11th Cir. 1982), cert. denied, 459 U.S. 859 (1982). However, in these cases the statutes at issue were not reviewed under the Bellanca standard for reasons inapplicable in this case.

Krueger was based upon the belief that the State of Florida had not delegated any of its Twenty-first Amendment authority to municipalities, and so the court reviewed the legislation at issue in that case under the stricter standard employed when legislation infringing on protected liberty interests is justified solely under the police power. 759 F.2d at 854. As noted above, this view of Florida law was rejected in Del Percio. Grand Faloon was based on the same misconception. 670 F. 2d at 944. Therefore, neither case is strictly applicable here.

In Leverett, the court examined a municipal ordinance which prohibited nude or semi-nude entertainment in any commercial establishment. The regulation of protected expression involved was therefore not incidental to the regulation of alcohol. 775 F.2d at 1540, at n.2. Accordingly, the court applied the strict standard of Krueger as opposed to the Twenty-first Amendment standard of LaRue and Bellanca.

Leverett is clearly in line with the weight of authority. When an ordinance regulates protected expression in a manner not incidental to the regulation of alcohol, a strict review of the ordinance must be undertaken. See e.g., Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) (ordinance applied to "any public place"); Chase v. Davelaar, 645 F.2d 735 (9th Cir. 1981) (resolution at issue applied to all non-theatrical establishments selling food or beverages); Salem Inn, Inc. v. Frank, 522 F.2d 1045 (2nd Cir. 1975) (ordinance applied to establishments such as coffee shops).

However, section 5-25 regulates nudity and nude expression only in establishments dealing in alcoholic beverages. Therefore, the regulation is incidental to the regulation of alcohol, and the second requirement for the application of Twenty-first amendment analysis is met. Accordingly, since the City of Daytona Beach posses the Twenty-first Amendment authority to regulate behavior in establishments which deal in alcoholic beverages, the ordinance must be reviewed within the context of the Twenty-first Amendment.

Analysis under Bellanca

In Bellanca, the Supreme Court held valid under the Constitution a statute similar to the section 5-25:

> No retail licensee for on premises consumption shall suffer or permit any person to appear on licensed

> premises in such manner or attire as to expose to view any portion of the pubic area, anus, vulva, or genitals, or any simulation thereof, nor shall suffer or permit any female to appear on licensed premises in such manner or attire as to expose to view any portion of breast below the top of the areola, or any simulation thereof.

452 U.S. at 714, n.l. The Court held that the powers conferred by the Twenty-first amendment to regulate the sale of alcohol outweighed any First Amendment interest in nude dancing. No specific factual evidence need be presented to the legislature. Instead, the court approved as sufficient the following legislative finding contained in the memorandum which accompanied the statute at issue:

> "Nudity is the kind of conduct that is a proper subject for legislative action as well as regulation by the State Liquor Authority as a phase of liquor licensing. It has long been held that sexual acts and performances may constitute disorderly behavior within the meaning of the Alcoholic Beverage Control Law ...
>
> "Common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior. This legislation prohibiting nudity in public will once and for all, outlaw conduct which is now quite out of hand."

Bellanca, 452 U.S. at 717-718. In the context of the Twenty-first Amendment, the court found this "common sense" rationale sufficient. "In short, the elected representatives of the State of New York have chosen to avoid the disturbances associated with mixing alcohol and nude dancing by means of a

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reasonable restriction upon establishments which sell liquor for on-premises consumption." Id., at 718.

Judged by this standard, the ordinance is clearly constitutionally valid on its face. Section 2 of Ordinance 81-334, which created section 5-25, contains sufficient rationale on its face[14] to satisfy scrutiny under Bellanca.[15] The prevention of rape, prostitution, and assaults on police officers are legitimate legislative ends. The means chosen are within the wide latitude given a legislative body under the Twenty-first Amendment. See LaRue, 409 U.S. at 116. The city has not totally prohibited nudity and sexual conduct, but has instead proscribed such things in establishments dealing in alcoholic beverages. See Del Percio, 476 So. 2d at 203.

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[14] Section 2 of the ordinance reads:

SECTION 2. It is hereby found that the acts prohibited in Section 1 above encourage the conduct of prostitution, attempted rape, rape, murder, and assaults on police officers in and around establishments dealing in alcoholic beverages, that actual and simulated nudity and sexual conduct and the depiction thereof coupled with alcohol in public places begets undesirable behavior, that sexual, lewd, lascivious, and salacious conduct among patrons and employees within establishments dealing in alcoholic beverages results in violation of law and dangers to the health, safety and welfare of the public, and it is the intent of this ordinance to prohibit nudity, gross sexuality, and the simulation and depiction thereof in establishments dealing in alcoholic beverages.

[15] The Defendants have filed a copy of the legislative history of the ordinance as Exhibit 5 to their Memorandum in opposition to the Plaintiffs' Motion for a Temporary Restraining Order. The court has not justified its holding based on this record, however, because under Bellanca the legislative findings contained in the ordinance itself are sufficient.

Overbreadth as to Scope of Establishment

Plaintiffs further contend that the type of examination conducted in Krueger, Leverett, and Grand Faloon must [be] engaged in reference to section 5-25 because the ordinance regulates behavior in establishments which are not licensed to sell alcoholic beverages, but instead applies to all establishments which deal in alcoholic beverages. In other words, the Plaintiffs argue that in order to engage in a Twenty-first Amendment analysis, it is not enough that the ordinance at issue be incidental to the regulation of alcohol. Instead, the ordinance must only apply to establishments licensed to sell alcoholic beverages.

No appellate court decisions have been cited to this Court which resolve the issue of whether the added presumption of validity under the Twenty-first Amendment can be applied to a statute which applies to establishments such as bottle clubs, where alcohol is consumed but not sold.[16] However , after a review of the case law and the rationale behind Bellanca, the court concludes that a Twenty-first Amendment analysis is properly conducted in this case.

The Court in Bellanca expressed its holding in a short statement: "The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs." 452 U.S. at 717. In so holding, the Court relied on its prior statement that

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[16] Bellanca also did not reach this issue.

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"... a state has absolute power under the Twenty-first Amendment to prohibit totally the sale of liquor within its boundaries. Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939)." However, the holding of Ziffrin went farther than the synopsis provided by the Court in Bellanca. In Ziffrin, the Court stated: "Without a doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are put." 308 U.S. at 138 (emphasis added). Since the Twenty-first Amendment gave the states broad powers with respect to the regulation of the possession of alcoholic beverages, the court holds that, under the analysis of Bellanca, this power entirely includes the lesser power to ban the possession (and consumption) of liquor on premises where nude entertainment occurs.

It is important to note that the evils sought to be redressed by this ordinance arise not merely from the combination of the sale of alcohol with nudity, but from the combination of the consumption of alcohol with nudity in establishments. See supra note 14.

The Court's conclusion herein is supported by several district court opinions that have applied a Twenty-first Amendment analysis under similar circumstances. First, in Patch Enterprises, Inc. v. McCall, 447 F. Supp. 1075 (M.D. Fla. 1978), the court held that a county's regulation of the business hours of a bottle club was fortified by the Twenty-first Amendment. Second, this Court in Jorgenson v. County of

Volusia, Case No. 86-41-Civ-Orl-19 (M.D. Fla. Oct. 16, 1986), held that a statute very similar to section 5-25, which also applied to any establishment dealing in alcoholic beverages, was valid under a Twenty-first Amendment analysis. Third, in G.P.Y., Inc. v. City of Jacksonville, Case No. 87-792-Civ-J-16 (M.D. Fla. October 13, 1987), the court, per Judge Moore, denied a preliminary injunction against enforcement of an ordinance which prohibited topless dancing in any commercial establishment where alcoholic beverages are consumed. The Court relied upon LaRue and Bellanca for its holding, indicating it engaged in a Twenty-first Amendment analysis. This ruling was upheld on appeal to the Eleventh Circuit on December 9, 1987, No. 87-3715, in an unpublished per curiam opinion.[17]

Overbreadth as to Type of Liquor

Plaintiffs next contend that the ordinance may not be analyzed under the Twenty-first Amendment because it applies to establishments that serve only liquor produced in state, rendering it overbroad. Plaintiffs have filed affidavits suggesting that they are willing to so limit their sales to liquor produced in the State of Florida.

Plaintiffs cite no case, other than Justice Stevens' dissent in Iacobucci, for the proposition that the Twenty-first

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[17] The court did not review the merits of the case, but held that the district court's order was not abuse of discretion.

Amendment gives no added presumption of validity where no liquor is imported. The Court will not so limit Bellanca.[18] Ziffrin explicitly stated that a state may absolutely prohibit the sale or possession of intoxicants "irrespective of when or where produced or obtained, ..." 308 U.S. at 138. Under the rationale of Bellanca, the power to ban the sales of liquor produced in state entirely includes the power to ban its sale on premises where nude entertainment occurs.

Overbreadth as to Graphic Representations

Plaintiffs next argue that the ordinance is overbroad in that it prohibits graphic representations of nudity or sexual conduct, such as movies or photographs. Plaintiffs cite Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), for the proposition that section 5-25 cannot be applied to restrict the showing of movies which contain nudity. However, Erznoznik was not a Twenty-first Amendment case, as the ordinance at

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[18] The Court, of course, intends no criticism of Justice Stevens' dissent. Indeed, that dissent is a persuasive critique on the entire course of Twenty-first Amendment analysis, especially as applied in Bellanca. See International Food &Beverage Systems v. City of Fort Luderdale, 664F. Supp. 482, 484 (S.D. Fla. 1987). However, Justice Stevens' views have not been accepted by a majority of the Supreme Court. While this Court is concerned with the implications of Bellanca for First Amendment freedoms, the Court is bound by that holding, and will not place an irrational limitation on Bellanca merely for the purpose of reducing the ambit of that decision.

issue there applied to all drive-in theaters regardless of whether the theater dealt in alcoholic beverages. Furthermore, Bellanca itself involved a statute which prohibited the display of simulations of nudity. 452 U.S. at 714, n.l. The regulation at issue in LaRue explicitly prohibited the display of films or pictures depicting nudity or sexual conduct. 409 U.S. at 112.

Here the legislative concern was the conjunction of nudity with alcohol, whether or not the nudity was "live." Accordingly, given the wide latitude as to choice of means to achieve a permissible end which law-makers possess under the Twenty-first Amendment, the ordinance is not facially invalid as to graphic representations. Dramatic performances containing nudity are not prohibited but are merely proscribed when presented in connection with the sale or consumption of alcohol. As set out above, this permissible.

Liberty Interest of Employees and Patrons

Plaintiffs filed a notice of supplemental authority, citing DeWeese v. Town of Palm Beach, 812 F.2d 1365 (11th Cir. 1987), for the proposition that there is a liberty interest in personal dress. To the extent that Plaintiffs are now claiming that the ordinance is unconstitutional as an infrigement of their liberty interests, or those of their customers,[19] the Court notes

[19] The Florida Supreme Court held in Del Percio that persons in the position of Plaintiffs here could not raise the liberty interests of customers under the overbreadth doctrine. 476 S. 2d at 206-207. The Court agrees

that usually such due process claims are subjected to less strict scrutiny than First Amendment claims. Since nude dancing is entitled to First Amendment protection, statutes which regulate such behavior are subject to an analysis which requires, among other things, the statute to further an important or substantial government interest. Grand Faloon, 670 F.2d at 947. Yet under Bellanca, legislative findings in a preamble to a statute are sufficient given the added presumption of validity to sustain regulation under the Twenty-first Amendment. Where, however, infringement of a substantive liberty interest is at issue, the plaintiff bears the greater burden of establishing that an ordinance is arbitrary and irrational. DeWeese, 812 F.2d at 1367. Because the government interest advanced by this statute is considered under Bellanca to be a substantial interest actually furthered by the ordinance, then a fortiori, the regulation is not arbitrary or irrational. Therefore, the restriction on the liberty interests in dress of the employees, owners and customers is not sufficient to overturn the ordinance.

Vagueness

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with this holding of Del Percio for the reasons stated in that opinion, but discusses the general constitutionality of the ordinance since the Plaintiffs can raise infringement of their own liberty interests to attack the ordinance. Since the Court must determine the effect of liberty interests in general, it also discusses the effect of customers' liberty interests.

Plaintiffs contend that the ordinance is unduly vague. However, after interpretation by the lower Florida courts and by the Florida Supreme Court in Del Percio, the Court concludes that the ordinance is clear. The Plaintiffs stated at the hearing on the preliminary injunction that, subsequent to rulings by the lower Florida courts, they have had no problems with the enforcement of the "buttocks" part of the ordinance. The Florida Supreme Court has, however, expansively interpreted the "topless" sections of the ordinance.[20] In neither case is the construction of the ordinance unclear. In some ways, the ordinance as interpreted is given very broad aplication in terms of the scope of nudity prohibited, see Del Percio, 476 So. 2d at 199-200, but that affects the Court's determination of overbreadth, not vagueness. The ordinance is not unconstitutionally vague as applied to the Plaintiffs in this case, who desire to present topless dancing in the context of consumption of alcohol. See South Florida Free Beaches v. City of Miami,734 F.2d 608, 611 (11th Cir. 1984) (ordinance which proscribed being "insufficiently clothed to prevent improper exposure" not unduly vague as applied to public nudity). See also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-495 (1982). As interpreted, the ordinance gives fair notice of its prohibitions

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[20] In Del Percio, The Florida Supreme Court interpreted sections (b) and (d) of the ordinance to prohibit exposure of any portion of the breast directly or laterally below the top of the areola. 476 So. 2d at 199.

and supplies standards for its enforcement to the same extent as any other criminal statute. See Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972).

The ordinance also does not fall within the ambit of Papachristou v. City of Jacsonville, 405 U.S. 156, 163 (1972), which overturned the ordinance that made "criminal activities which by modern standards are normally innocent." While the instant ordinance as interpreted may prevent employees of a bar from topless dancing, or even from wearing clothes in the bar that could be worn on the street, such a prohibition does not rise to the level of the vagrancy statute at issue in Papachristou, [21] which made criminal activities such as taking a midnight stroll and was much broader in scope of possible enforcement and conduct prohibited. While the Court may doubt the wisdom of prohibiting low-cut gowns in bars, the question of the advisability of any such ordinance is for the legislature, unless, of course the ordinance infringes upon protected constitutional freedoms. See Village of Hoffman Estates, 455 U.S. at 494-495. In this regard, the Court has above determined that the ordinance is constitutional under the applicable standards.

Accordingly, the Plaintiffs' Motion for Partial Summary Judgment is DENIED, and the Defendants' Motion

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[21] Furthermore, although the Supreme Court did not discuss vagueness in Bellanca, the ordinance approved in that decision was very similar in scope of prohibition to section 5-25.

for Partial Summary Judgment is GRANTED. The issues not disposed of in this order, including selective enforcement and the individual damage claims, remain for trial or later disposition in this matter.

DONE AND ORDERED in Chambers at Orlando, Florida, this 12th day of January, 1988.

PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:
Frank B. Gummey, III
Eric A. Latinsky

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CHRIS GEANEAS, etc., et al.,

Plaintiffs,

v. CASE NO. 83-344-CIV-ORL-19

CHARLES W. WILLETS, et al.,

Defendants.

ORDER

This case was presented to the Court sitting as jury for trial on February 22, 23 and 28, 1989.[1] In its previous Order dated January 12, 1988, this Court determined that Daytona Beach Ordinance 81-334, codified as City of Daytona Beach Code Section 5-25, is not unconstitutional on its face. As to the contention of vagueness, however, the Court at that time focused primarily on the provisions of the Ordinance dealing with exposure of the female breast, as the parties had stated that they were not then in contention concerning the provision of the Ordinance prohibiting exposure of buttocks. However, the Plaintiffs now claim that the City has revived its enforcement of

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1 At trial Plaintiffs' oral motion to voluntarily dismiss their claims against John M. Power was granted.

the buttocks portion of the Ordinance, and therefore this additional issue has been presented to this Court.

This Order is limited to determination of two issues: (1) whether the portion of the Ordinance prohibiting exposure of buttocks is unconstitutionally vague; and (2) whether the Ordinance has been selectively enforced against the Plaintiffs.

STATEMENT OF THE FACTS

Effective October 21, 1981, the City of Daytona Beach enacted City Code Section 5-25 (Daytona Beach Ordinance No. 81-334), which provides in pertinent part:

> "(a) No person shall expose to public view his or her genitals, pubic area, vulva, anus, anal cleft or cleavage or buttocks or any simulation thereof in an establishment dealing in alcoholic beverages.
>
> (b) No female person shall expose to public view any portion of her breasts below the top of the areola or any simulation thereof in an establishment dealing in alcoholic beverages."

The Ordinance also prohibits persons maintaining, owning, or operating an establishment dealing in alcoholic beverages from suffering or permitting such conduct. The practical result of this enactment was to create a clash between those responsible for enforcing the laws of the City and the owners and

employees of the then "topless go go" establishments located within the city.

Partly because of the social context in which this Ordinance was enacted, there was a period of uncertainty as to the meaning of the prohibitions contained in the enactment. On May 22, 1982 Leslie Grier, now Hamlin, was arrested for performing an exotic dance during which a portion of her buttocks was exposed. The charges were dismissed pursuant to an order of the state County Court Judge Josephson dated April 23, 1982 in which it was determined that the entire buttocks must be exposed before a violation of the Ordinance occurred. On October 2, 1982 Ms. Grier-Hamlin was again arrested for exposure of a portion of her breast below the areola and for exposure of her buttocks during a performance in one of the Plaintiffs' establishments. On April 21, 1983 state County Court Judge McDermott dismissed the carges, ruling that the prohibition against exposure of the female breast in the Ordinance was overly broad and the prohibition against exposure of buttocks required the entire buttocks to be exposed to constitute a violation.

On October 8, 1982 Denise Carol Del Pinto, now Ferraro, was arrested and charged with violating this Ordinance, and on August 14, 1982 Donna Michelle Boido, now Heiser, a bartender was arrested as a person in charge of one of the Plaintiff establishments when a violation of the Ordinance occurred. Further, in November of 1982, Mr. Leonard Paul Del Percio, principal shareholder and owner of

the Shingle Shack and the Function Junction, removed photographs from the walls of his establishments and ceased a sale of calendars featuring pictures of his exotic dancers pursuant to direction of officers of the City of Daytona Beach Police Department under authority of the Ordinance.

Other arrests followed and led to contradictory orders of the state courts as to the meaning of the Ordinance and the conduct which was prohibited.[2] On March 29, 1984 the Florida Fifth District Court of Appeal determined that the Ordinance was "vague, overbroad, not fairly enforceable, and thus unconstitutional." Del Percio v. City of Daytona Beach, 449 So.2d 323 (Fla. 5th DCA 1984). Thereafter, the Supreme Court of Florida issued its opinion on August 30, 1985 upholding the constitutionality of the Ordinance and determining that exposure of the female breast below a line drawn across the top of the areolae was prohibited conduct. City of Daytona Beach v. Del Percio. 476 So.2d 197 (Fla. 1985).

More recently, exotic dancers in the Plaintiffs' establishments have been arrested for exposure of their buttocks while wearing t-straps, making the provision of the Ordinance prohibiting exposure of buttocks in establishments

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2 The employees of the commercial establishments dealing in alcoholic beverages which also afforded exotic dance as entertainment changed the types of costumes being worn in response to court orders, utilizing, inter alia, flesh colored surgical tape to cover the breasts and t-straps to cover the dancer's posteriors.

dealing in alcoholic beverages an issue properly presented for determination by this Court.

With one exception, the evidence reflects that the City of Daytona Beach police enforce the Ordinance only against employees of establishments dealing in alcoholic beverages which also feature exotic dancing as entertainment for their patrons, although the officers acknowledged that the Ordinance could be enforced in other areas of the City.[3] Both former Police Chief Willits and present Police Chief Crowe testified that there was no policy precluding enforcement of the Ordinance in pool bars and other establishments dealing in alcoholic beverages in addition to its enforcement in the establishments affording exotic dance as entertainment. The officers also testified that Ordinance 29-5, prohibiting exposure of the areola of the female breast, was the ordinance of choice enforced in other commercial estaablishments dealing in alcoholic beverages, excluding the exotic dance bars.

The evidence was undisputed that in commercial establishments dealing in alcohol, excluding such establishments which provided exotic dance as entertainment,

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[3]Other than a recent arrest at an establishment known as Razzles, there is no evidence that Section 5-25 has been enforced in any establishments other than those featuring exotic dancers. Although Captain Barry Neal of the Daytona Beach Police Department, who was not an arresting officer, testified that he thought Ordinance 5-25 was enforced in establishments dealing in alcoholic beverages other than those featuring exotic dancing, especially during bike week and spring break, the remaining officers who testified on the subject stated that while the Ordinance could be enforced in other establishments dealing in alcoholic beverages, it was actually enforced only in those establishments which also featured exotic dancing.

portions of the female breast below the areola and portions of the buttocks were exposed without arrests being made, even though the violations were known to Daytona Beach police officers who were present at the time. These violations of the Ordinance were more prevalent during "bike week" and "spring break", when wet t-shirt contests and bikini contests at the pool-side bars along the city's famous beach resulted in numerous technical violations of the Ordinance, with an estimated fifty percent or more of the females present at these events wearing bathing suits exposing a portion of the buttocks.

No malice, bad faith, or racial or religious discrimination attributable to Defendants was shown by the evidence. Defendants explain their enforcement of the Ordinance only in the non-residential establishments dealing in alcoholic beverages which also afford exotic dancing as entertainment on the grounds, inter alia, (1) that such establishments and their employees have knowledge of the Ordinance whereas tourists and other persons present at other commercial establishments dealing in alcoholic beverages do not; (2) that the police department is aware of a history of flagrant and consistent violations of the Ordinance occurring in commercial establishments dealing in alcoholic beverages which also offer exotic dancing as entertainment; (3) that the manpower constraints of a police force numbering two hundred and ten officers for a city of sixty-two thousand regular inhabitants, which number swells to between three and seven

hundred thousand during spring break, bike week and other special events, make it impossible to cause an arrest for every violation of the Ordinance; and (4) that the police officers, exercising their discretion, choose not to enforce the Ordinance at certain crowded and raucous events where there is, in their view, a significant risk that such enforcement would cause danger to the safety of the officers and/or the public.

The police officers who were questioned on the subject testified that if any part of the buttocks were exposed in a non-residential establishment dealing in alcoholic beverages, an arrest could be made for a technical violation of the Ordinance, and that it was left to each officer's discretion as to how much of the buttocks must be exposed before an arrest under the Ordinance would be made. While all agreed that the arrests actually made under the Ordinance were only for "flagrant" or "obvious" violations, the officers differed in their opinions as to what constituted a "flagrant" or "obvious" violation.

At the conclusion of the trial the Court questioned the parties, indicated the Court's preliminary and tentative views, allowed the parties to present further argument to rebut or strengthen the court's initial analysis, and requested that the parties submit to the Court any additional law supporting their respective positions. Upon further reflection and consideration of the evidence, the arguments, and the authorities presented by the parties, the Court rules as follows.

I. Facial Constitutionality of Provision Prohibiting Exposure of Buttocks

The Court agrees with Plaintiffs that the portion of this Ordinance prohibiting exposure of buttocks is somewhat vague. First, the Ordinance does not specify whether the entire buttocks, or what portion thereof, must be covered. Secondly, the Ordinance does not define the word "buttocks," and this term is not easily reduced to precise definition. The Court finds that the buttocks provision is not unconstitutionally vague, however.

The Ordinance is not "impermissibly vague in all of its applications." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-95 (1982).[4] There is no question that the Daytona Beach Ordinance would prohibit complete exposure of the entire buttocks, and there could be no claim of vagueness or ambiguity as to such application of the Ordinance. Since the Ordinance is capable of at least this one valid application, it could not be held unconstitutionally vague on its face under the test in Hoffman Estates.

It is true that enactments which interfere with constitutionally protected conduct should be held to a more stringent test for vagueness than other enactments. Hoffman Estates, supra, at 499. While the Twenty-first Amendment augments the City's power to restrict the Plaintiffs' exercise of

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[4] At least where an enactment "implicates no constitutionally protected conduct," it should not be held facially unconstitutional if it is capable of any valid application. See Hoffman Estates, supra, at 494 n. 5, citing Steffel v. Thompson, 415 U.S. 452, 474 (1974). See also High Ol' Times, Inc. v. Busbee, 673 F.2d 1225, 1228 (11th Cir. 1982).

their First Amendment rights in connection with the sale of liquor,[5] it does not obliterate those rights entirely, nor does it affect the Plaintiffs' due process right to fair notice of what is prohibited. Cf. Craig v. Boren, 429 U.S. 190 (1976) (holding that the Twenty-first Amendment does not alter the application of equal protection standards). The Court finds, however, that Section 5-25 withstands even a stringent test for vagueness.

The rationale benind the "void for vagueness" doctrine was discussed by the Supreme Court in Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972). "First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Id. "Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." Id. Third, vague laws may tend to chill the exercise of constitutionally protected conduct. Id. With these underlying concerns in mind, the Court finds that the language of the Ordinance is not impermissibly vague.

Webster's New International Dictionary (2nd Edition, unabridged, 1942) defines "buttock" as: "1. The part at the back of the hip, which in man forms one of the protuberances on which he sits; in pl., the rump." In Stedman's Medical Dictionary (Fifth Unabridged Lawyers' Edition, 1982),

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5 California v. LaRue, 409 U.S. 109 (1972); New York State Liquor Authority v. Bellance, 452 U.S. 714 (1981).

"buttock" is defined as "nates," and "nate" is defined at "...the prominence formed by the gluteal muscles on either side." The gluteal muscles, in turn, consist of the gluteus medius and the gluteus maximus, and run from the back of the hip to the back of the leg. Admittedly, it is not easy to pinpoint for all persons the exact place on the body where the "prominence formed by the gluteal muscles" begins and where it ends, given the interwoven nature of the human musculature and the variation of the contours of human flesh.

The fact that the word "buttocks" may be difficult to define in words does not mean that it is impermissibly vague, however. While it is cumbersome to articulate a precise definition which conforms to the common understanding of the word "buttocks" as commonly understood can be defined, the term is not so vague as to make compliance with the Ordinance unduly difficult or enforcement unduly arbitrary, nor is it so vague as to chill the Plaintiffs' conduct.[6]

While the City of Daytona Beach could perhaps have drafted a more precise statute, the "prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision." Rose v. Locke, 423 U.S. 48, 49 (1975). See also United States v. Powell, 423 U.S. 87, 94 (1975); United States v. Petrillo, 332 U.S. 1, 7 (1947). Indeed, "few words

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6 There has been no testimony suggesting that the dancers cover more than the buttocks in order to be sure they are in compliance, nor that exotic dancing has been chilled.

possess the precision of mathmatical symbols, most statutes must deal with untold and unforeseen variations in factural situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor it it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." Boyce Motor Lines v. United States, 342 U.S. 337 (1952).

"In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proferred." Hoffman Estates, supra, at 494 n. 5, citing Grayned v. City of Rockford, supra, 110 (1972). The Florida Supreme Court in City of Daytona Beach v. Del Percio, 476 So.2d 197 (Fla. 1985) gave its interpretation of the breast portion of the Ordinance, but did not interpret the buttocks portion. since this Court is unable to certify the question, it must attempt to extrapolate the meaning the state's highest court would most likely give to the buttocks provisions. See Grayned, supra, at 110.

After consideration of the wording of the Ordinance itself, the various interpretations of the Ordinance by the state trial courts, and the Florida Supreme Court's ruling on the breast portion of the Ordinance, this Court is of the opinion that the Florida Supreme Court would interpret the buttocks portion

of the ordinance to prohibit exposure of any portion of the buttocks. Further, the state's highest court would probably define the word "buttocks" to include the area at the rear of the body which lies between two imaginary lines running parallel to the ground when a person is standing, the first or top such line drawn at the top of the cleavage of the nates and the second or bottom line drawn at the lowest visible point of this cleavage or the lowest point of the curvature of the fleshy protuberance, whichever is lower, and between two imaginary lines on each side of the body, which lines are perpendicular to the ground and to the horizontal lines described above, and which perpendicular lines are drawn through the point at which each nate meets the outer side of each leg. The Ordinance would be violated, therefore, if any portion of this area is visible from any vantage point. Since this is the "core meaning" which "persons of ordinary intelligence" would draw from the language of the Ordinance as it is written, the Ordinance is not impermissible vague. See High Ol' Times v.Busbee, 673 F.2d 1225 (11th Cir. 1982).

As to the question whether the Ordinance prohibits partial or only total exposure of the buttocks, since it would be unreasonable to imagine that the City Council intended to permit partial exposure of the genitals, pubic area, vulva, anus or anal cleft or cleavage, in light of the stated legislative purpose to prohibit "nudity and sexual conduct and depiction thereof coupled with alcohol in public place," and since the words "or buttocks" appear as words in a series within the

same clause as "genitals, public area, vulva, anus, or anal cleft or cleavage," a person of ordinary intelligence would assume that the legislature intended to prohibit exposure of any portion of the buttocks.

This construction is also consistent with the interpretation of the buttocks provision by those charged with enforcing the Ordinance. The officers who testified on the subject stated that they interpreted the Ordinance as prohibiting exposure of any portion of the buttocks. While the officers had difficulty giving a precise definition of the term "buttocks," and while they differed as to what would amount to a flagrant violation for which they would arrests were made for, exposure of areas of the buttocks outside the lines described above.

While two state trial courts have interpreted the Ordinance to allow partial exposure of the buttocks and to prohibit only exposure of the entire buttocks,[7] the converse of this Court's ruling, these state trial courts were apparently straining to construe the statute narrowly in order to save it from unconstitutional overbreadth. Later, in City of Daytona Beach v. Del Percio, supra, the Florida Supreme Court indicated that such narrow constructions were unnecessary in light of the Twenty-first Amendment cases. The state Supreme Court in that case was willing to draw an imaginary line across the top of the areolas, and it seems probable that it would draw

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7 See Order of County Judge Josephson dated September 23, 1982, Plaintiffs' Exhibit 5-C' and Order of County Judge McDermott dated April 21, 1983, Plaintiffs' Exhibit 5-K and L.

the lines described here as to the buttocks portion of the Ordinance.

II. SELECTIVE ENFORCEMENT OF THE ORDINANCE

Plaintiffs have also argued that the Ordinance has been selectively enforced against them. To establish their claim of selective enforcement, the Plaintiffs would have to show (1) that they have been singled out for prosecution while others who are similarly situated have not been prosecuted while others who are similarly situated have not been prosecuted, and (2) that the selection of Plaintiffs for prosecution was invidious or in bad faith. Fillingim v. Boone, 835 F.2d 1389, 1399 (11th Cir. 1988); Lanier v. City of Newton, 842 F.2d 253, 256 (11th Cir. 1988).

The court finds that Plaintiffs have set forth evidence sufficient to meet the first prong of the selective enforcement test. Section 5-25 has been enforced almost exclusively against those presenting partially nude, non-obscene dance as entertainment, even though by its terms the Ordinance is applicable to all non-residential establishments dealing in alcoholic beverages and even though violations of the Ordinance do occur in other such establishments.

Plaintiffs have not shown, however, that the City's prosecution of Plaintiffs was invidious or in bad faith. The United States Supreme Court has made clear that "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." Oyler v. Boles, 368 U.S. 448, 456 (1962); see also Owen v. Wainright, 806 F.2d

1519 (11th Cir. 1986), cert. denied sub nom, Owen v. Dugger, 481 U.S. 1071 (1987). As stated by the Eleventh Circuit, "[t]he invidiousness requirement is satisfied only if it can be established that the government's selective prosecution is motivated by constitutionally impermissible motives such as racial or religious discrimination or interference with the legitimate exercise of constitutional rights." Fillingim, supra at 1399, citing United States v. Lichtenstein, 610 F.2d 1272, 1281 (5th Cir. 1980), cert. denied sub nom, Bella v. United States, 447 U.S. 907 (1980). While the Ordinance here affects the exercise of constitutional rights, the selectivity evidenced by the City in enforcing this Ordinance was not shown to have been motivated by an intent to interfere with such rights. Nor have Plaintiffs suggested any other impermissible motive on the part of the Defendants.

Plaintiffs have presented no evidence that Defendants attempted to do anything other than effectuate the intent of the Ordinance. While the Plaintiffs have offered no evidence of an invidious motive, the City has indicated that it chose to enforce the Ordinance against these particular Plaintiffs because the violations of the Ordinance by these Plaintiffs have been longstanding and flagrant and because these Plaintiffs have had knowledge and fair warning of the Ordinance's provisions.[8] Defendants have also convincingly demonstrated that

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[8] These warning include, but are not limited to, letters sent by police officers to the Plaintiffs' establishments prior to initiating enforcement of the Ordinance. See Defendants' Exhibit 3.

enforcement of the Ordinance in other establishments dealing in alcoholic beverages would involve persons unaware of the Ordinance and, during events such as bike week and spring break, would often be impractical, in some circumstances endangering the safety of the officers and/or the public. The burden of proof in establishing a claim of selective prosecution is a heavy one. Fillingim, supra at 1398, citing United States v. Johnson, 577 F.2d 1304, 1308 (5th Cir. 1978). Plaintiffs have not met it here.

III. Conclusion

In summary, the Court not concludes that the provisions of Daytona Beach City code Section 5-25 prohibiting buttocks exposure, as well as the provisions prohibiting breast exposure, are not unconstitutional facially or as applied, and that the Ordinance has not been selectively enforced in a manner violative of Plaintiffs' constitutional rights. The issue of damages, therefore, is moot, and the case is **DISMISSED.**

DONE AND ORDERED in Chamber at Orlando, Florida, this 15 day of March, 1989.

PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:
All counsel of Record

APPENDIX E

IN THE COUNTY COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

THE CITY OF DAYTONA BEACH,

v.

LENA LENORA DUCILLE, CASE NO. V82-6886-DB

Defendant.

THE CITY OF DAYTONA BEACH

v.

LESLIE JENNINGS GRIER, CASE NO. V82-6880-DB

Defendant.

ORDER

THIS CAUSE came on to be heard on the Defendant's Motions to Dismiss the charges filed against them by the City of Daytona Beach. This is the case of the bottomless ordinance.

The Defendants are charged with Violation of City Ordinance 5-25 (a) which provides as follows:

> "No person shall expose to public view his or her genitals, pubic area, vulva, anus, anal cleft or cleavage or buttocks or any simulation thereor in an establishment dealing in alcoholic beverages."

The charging instrument (SA-751) alleges that Ms. Ducille "while employed by the above establishment and performing on state in front of an audience of approx. 20 people perform three dances where her buttocks were exposed to view. The small panties that the def. was wearing would slide into the anal cleft and the def. made made no attempt to correct the violation."

With reference to Ms. Grier, the charging instrument (SA-751) states, "Def. wore a G-string type lower panty set that clearly revealed def's buttocks. Panty covered the front area of def., but only had a thin string down rear buttocks area.

The Defendant s Motions to Dismiss raises several points, one of which can be referred to as a C-4 Motion in which it is asserted that there are no material disputed facts and the undisputed facts failed to establish a prima facie case. One of the facts asserted in the Motions to Dismiss was that the defendant's buttocks were at least "partially covered."

The City did not traverse the Motion to Dismiss so that the factual matters alleged in the Motion to Dismiss are deemed admitted. (See Rule 3.190(d) FrCP).

The defendants also assert in their Motions to Dismiss the constitutionality of the Ordinance on several grounds.

The constitutionality of the Ordinance and Ordinances of similar nature have already been declared constitutional by our Appellate Courts and the constitutionality of this particular ordinance is now pending in the Circuit Court in this Judicial

Circuit. (See Board of Commissioners of Lee County v. Dexterhouse 348 So.2d 916 affirmed, Martin v. Board of County Commissioners of Lee County, 364 So.2d 449, appeal dismissed, 99 S.Ct. 2024, Del Percio v. City of Daytona Beach, V81-11598-DB appeal number 82-1243-CA-01-D)

It is a long established rule that Courts will not consider the constitutionality of an ordinance unless it is necessary to do so in order to dispose of the problem at hand (North American Company v. Green 120 So.2d 603)

In the case at bar, the Court finds that it is not necessary to consider the Constitutionality of the specific section of the ordinance attacked in order to dispose of the matter. This matter can be disposed of on a factual basis, rather than as a matter of law.

The City, by failing to file a traverse to the Motions to Dismiss admits that the defendant's buttocks were partially covered.

"Buttocks" as defined in Webster's Seventh New Collegiate Dictionary is as follows:

> "Either rounded half of the lower part of the back together forming the part on which a person sits."

It is also defined in Gould Medical Dictionary 3rd Edition, McGraw-Hill, Inc., as being:

> "One of the two fleshy parts of the bodys posteria to the hip joint."

By the definitions there is no precise point at which the buttocks begins or ends and covers a wide undefined area.

At least the ordinance in question, by proscribing the exposure of breasts has a reference point by prohibiting the exposing of the breast "below the top of the areola" (See Section 5-25(g)) This is a reasonable restraint, otherwise any person entering an establishment where alcoholic beverages are served and wearing a low cut dress would be subject to violation, having exposed the upper portion of her breast.

In todays society where the female dress code is quite liberal, especially in bathing suit wear where female persons waear bikinis and french cut bathing suits, much of their buttocks are exposed to public view and can even be seen on television advertisements. One might even include females who wear "short shorts" and do their shopping in supermarkets where alcoholic beverages are sold (See Steffens v. State 343 So.2d 90)

In Florida State Racing Commission v. McLaughlin 120 So.2d 574 it was held that the use by the Legislature of a comprehensive term ordinarily indicates everything embraced within the term.

In construing an ambiguous statute it is proper to take into consideration the particular evils at which the legislation is aimed or mischief sought to be awarded (30) Fla Jur, Page 203)

The word buttocks by medical definition and common language is to say the least ambiguous for one cannot define the

beginning or ending of that part of the anatomy. The evil sought to be avoided by this ordinance is nude dancing, not semi-nude dancing. To construe the ordinance to read partially exposed buttocks would please an unbridled discretion upon the Courts to determine how much of the buttocks should be partially exposed in order to find a violation of the ordinance.

It is therefore the interpretation of this Court that in order to find any person in violation of the ordinance, all of his or her buttocks must be exposed.

Admitting that the defendant's buttocks were partially covered the Court finds that the City is unable to prove a prime facia case.

With reference to the Defendant Ducille, she is charged with a second violation of Ordinance 5-25 in that the charging instrument (SA-751) alleges as follows:

> "While employed by the above establishment approach an unidentified white male in the area of the pin ball machine and allow herself to be hugged and kissed. The white male was further observed to caress and fondle the co-def around the area of the buttocks in plain view of approx. 30 patrons in the establishment." underlines supplied.

Section 5-25(c) which states:

> "No person shall engage in and no person maintaining, owning, or operating an establishment dealing in alcoholic beverages shall suffer or permit any sexual intercourse, masturbation, sodomy, beastiality, oral copulation, flagellation, any sexual act which is prohibited by law, touching, carressing or fondling of the breast, buttocks, anus or genitals or the simulation

thereof within an establishment dealing in alcoholic beverages."

The ordinance requires the touching or fondling of the "buttocks" not the "area of the buttocks" as alleged in the charging instrument. It is therefore the opinion of this Court that the charging instrument is defective in failing to state a violation of 5-25(c) of the ordinance, it is therefore

ORDERED AND ADJUDGED that the Motions to Dismiss against these defendants on the charges pending against them, be and the same, are hereby dismissed.

DONE, ORDERED AND ADJUDGED in Chambers at Halifax Law Center, Holly Hill, Volusia County, Florida this 23rd day of September, 1982.

NORTON JOSEPHSON
COUNTY COURT JUDGE

Copies to:

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Post Office Box 551
Daytona Beach, Florida 32015

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APPENDIX F

IN THE COUNTY COURT
OF VOLUSIA COUNTY,
FLORIDA

CASE NO: V82-12397-DB

CITY OF DAYTONA BEACH,
Plaintiff,

vs.

LESLIE JENNINGS GRIER,
Defendant.

ORDER

THIS CAUSE came on the be heard on Defendant's Motion to Dismiss. Defendant is charged with violating Daytona Beach Ordinance #5-25(a) and 5-25(b) which provide:

> (a) No person shall expose to public view his or her genitals, public area, vulva, anus, anal cleft or cleavage or buttocks or any simulation thereof in an establishment dealing in alcoholic beverages.
>
> (b) No female person shall expose to public view any portion of her breasts below the top of the areola or any simulation thereof in an establishment dealing in alcoholic beverages.

Defendant's Motion to Dismiss contends:

a. That the undisputed facts do not establish a prima facie case of guilt;

b. That the Ordinance is unconstitutionally overbroad as applied to this Defendant, in violation of the United States and Florida Constitutions;

c. That the Ordinance is unconstitutionally vague as applied to this Defendant, in violation of the United States and Florida Constitutions;

d. That the charging document does not state an offense under ordinance 5-25.

The Motion alleges as undisputed the following facts:

A. Defendant did not expose her entire buttocks;

B. Defendant did not expose her areola (or any portion thereof);

C. Defendant did not expose that area directly underneath her areola.

The Court has considered the memoranda of law prepared by counsel for the City and the Defendant, the City's response to the Motion to Dismiss, the charging document and the deposition in the court file as well as the arguments of counsel at hearing.

In the aftermath of the U.S. Supreme Court decision in Schad v. City of Mount Ephraim 68 L. Ed 2d 671 (1981) which finds nude dancing to be a form of expression which is constitutionally protected by the First Amendment, this Ordinance is overbroad if the incidental restriction on First Amendment freedoms is greater than what is essential to the furtherance of a substantial governmental interest.

The Court has determined, however, that any constitutional infirmities presented by the ordinance can be resolved by construing the Ordinance as written while considering the City's Announced purpose to prohibit nudity

and sexual conduct in establishments dealing in alcoholic beverages.

The Florida Supreme Court has held in State v Cotney 104 So. 2d 346 (Fl. 1958) that it is a court's duty to adopt an interpretation that in order for a person to be in violation of Section (a) of the Ordinance all of his or her buttocks must be exposed. This Court finds persuasive the reasoning of Judge Josephson in the combined cases of City of Daytona Beach vs Ducille and Grier (attached).

With this limitation engrafted on Section (a) the Court finds that the Ordinance is not unconstitutionally vague or overbroad.

The case of Spees v State (attached) in which Circuit Court Judge Kaney in Orange County, Florida narrowly construed Orange County Ordinance 77-8 in reliance on Foley v State 50 So. 2d 179 (Fl. 1951) was also considered as persuasive authority by this Court. In Spees the court construed the phrase "at or below the areola thereof" to require only that the areola itself be covered.

The Court construes Section (b) of the Ordinance to require a female person to expose at least a portion of her areola to the public view in order to be in violation. With these limitations engrafted the Court finds the Ordinance is not unconstitutionally vague or overbroad.

The Court finds that the City's having failed to traverse Defendant's Motion to Dismiss, it is admitted that Defendant's buttocks were partially covered and that no part of the areola

was uncovered. Therefore, the City is unable to prove a prima facie case.

It is therefore ordered and adjudged that the Motion is granted and the pending charge dismissed.

DONE, ORDERED AND ADJUDGED in Chambers this ___ at the Courthouse Annex, New Smyrna Beach, Volusia County, Florida this 21 day of April 1983.

Judge Michael McDermott

cc: Eric A. Latinsky, Esq.
Reginald Moore, Esq.

IN THE CIRCUIT COURT IN
THE NINTH JUDICIAL
CIRCUIT IN AND FOR
ORANGE COUNTY,
FLORIDA

CASE NO. CJAP 78-72

JULIE ANN SPEES,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

OPINION

THE APPELLANT, hereinafter referred to as Defendant, was charged with two violations of the anti-nude dancing ordinance of Orange County, 77-8. She filed motions to dismiss. Upon the denial of these motions, she pled Nolo Contendere, reserving the right to appeal these denials. She did so directly to the Supreme Court on the basis that the trial court ruled on the constitutionality of the ordinance. The Supreme Court found no jurisdictional basis for the appeal, and transferred the cause to this court. She raises three points on this appeal:

The ordinance is unconstitutional due to vagueness and overbreadth; it violates equal protection because it applies only to establishments serving liquor for on premises consumption;

and there was a lack of evidence that the beer served was an alcoholic beverage. She looses on all three.
I affirm.

I shall deal with these in inverse order. The second motion to dismiss dealt with the fact that the State could not prove that the beer being sold was an "alcoholic beverage". It did not have to. The ordinance dealt with the offering for sale of alcoholic beverages and that does not require proof that the beer here was an alcoholic beverage.

Defendant's next point goes to the violation of the equal protection clause and is twofold. First, she complains that the ordinance is directed only at establishments offering alcoholic beverages for sale, i.e., nightclubs, and then only nightclubs in the unincorporated areas of the county.

The equal protection clause does not outlaw all classifications or distinctions, only the unreasonable in dealing with parties similarly situated. Atlantic Coastline Railroad Company vs. Coachman 1910 59 Fla. 130 52 So 377. The Orange County Ordinance is not unreasonable or arbitray. It applies equally to all "persons" similarly situated, that is, all commercial establishments offering alcoholic beverage for sale for on-premises consumption. The classification in that the activities sought to be regulated occurs in those establishments, not in garden shops, beauty parlors, or five and dime stores.

Defendant contends that the ordinance must fall because it applies only in the unincorporated areas of the county. She cites article section 1 (F) as authority for this contention. That

section does not prevent the county from enacting an ordinance applying only to the areas outside the municipalities. As a matter of fact, the section provides that if there is a conflict between the two governments, the county ordinance does not apply within the municipal limits. In the present case none of the municipalities have spoken on this subject one way or the other. Orange County Ordinance 77-8 climates the possibility of a conflict by exempting those areas wherein a municipality has superior right to regulate the conduct of establishments offering alcoholic beverages for sale for on the premises consumption.

Her last point deals with the claim of vagueness and overbreadth of the ordinance.

Defendant contends that the word areola is not a word of common understanding, and so the ordinance is vague. This word is the anatomical word for that portion of the human breast to which it applies. There can be no better word. But this is a rather minor point.

Her primary thrust on the vagueness is that the words "at or below the areola thereof" are not clear and concise and that the ordinance as worded, makes criminal the wearing of a padded bra and the exposing of the anal cleft in the ladies restroom.

A principle of judicial construction of laws is that the court should construe the wishes of the legislative body in a manner that would make the legislation constitutionally permissible. The court has a duty to avoid a holding on

unconstitutionality if a fair construction of the legislation will so allow. As our Supreme Court said in Foley vs. State (951, Fla.) 50 So 2d 179 "The general legislative intent will control the strict letter of the statute where an advertence to the strict letter would lead to absurdities or unreasonable conclusions."

"If the language of a particular provision imports an absurd intent or one which leads to civil consequences, the strict letter of the law may yield to the clear legislative intent."

It is clear to this court that the county commission did not intend to prohibit the use of the restroom facilities in the regulated establishments. In such restroom facilities it would be necessary to expose certain portions of the anatomy thus the ordinance could not be used to regulate ordinary or normal conduct in such restrooms.

In accordance with the principles laid down in Foley the court interprets the phrase "at or below the areola" to mean from the upper portion of the areola to the bottom of it on each breast. This would not require a covering on a line running from the top of one areola across to the top of the other. That interpretation would require more covering than is presently seen on our beaches or behind ski towboats.

With these limitations engrafted on the court finds and so rules that the ordinance is constitutional and that the County Court was correct in denying the motions to dismiss.

The order appealed from is affirmed.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida this 7th day of September, 1979.

FRANK N. KANEY, CIRCUIT JUDGE

I HEREBY CERTIFY that a copy of the foregoing Opinion has been furnished by mail/hand delivery to the office of the State Attorney, 250 N. Orange Avenue, Orlando, Florida, and to Richard L. Wilson, Esq., 27 E. Pine Street, Orlando, Florida 32801, this 7th day of September, 1979.

Secretary

APPENDIX G

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

APPEAL NO: 83-3161-CA-01-D

COUNTY CASE NO: V83-5736-DD

SUZANNE M. KEISER

Appellant,

vs.

CITY OF DAYTONA BEACH,

Appellee.

OPINION

THIS CAUSE is an appeal from a "Final Order of Disposition" entered in the county Court of volusia County on August 22, 1983. That Order refers to and "clarifies" a prior Order entered by the same Judge in April of 1983. Based on this clarification the Defendant entered her plea of no contest, reserving her right to appeal the denial of her motions to dismiss.

The appellant, the defendant below, was arrested on May 3, 1983 and charged with violating Section 5-25(B)[1] of the Daytona Beach Municipal Code. The appellant had performed a dance on stage at the Shingle Shack lounge in Daytona Beach wearing "pasties," which covered only the areola of her breasts. The appellant performed in this matter in reliance on a prior ruling of the trial Judge in City of Daytona Beach Vs. DelPinto, Case No: V82-13010-DB.[2]

On the date of the trial, the trial Judge clarified this prior ruling and agreed to withhold adjudication of guilt and waive sanctions if the Defendant pled no contest. The clarification (paragraph (5) of the Order being appealed) reads as follows:

> "(5) that the undersigned hereby clarifies his Orders entered in April of 1983 to rule that the areolae must be concealed by a brassiere-type cover made of an opaque fabric which does not and cannot adhere directly to the breasts without the aid of supporting straps, for a defendant to be found not to have violated the pertinent sub-sections of the Code:"

The main issue for this Court's determination is of whether the ordinace as interpreted by the trial court is unconstitutionally overbroad.

---

1 "No female person shall expose to public view any portion of her breasts below the top of the areola or any simulation thereof in an establishment dealing in alconolic beverages."

2 "The Court construes Section (B) of the Ordinance to require a female person to expose at least a portion of her areola to the public view in order to be in violation.

The basic task for any court reviewing a statue of ordinace which has been challenged as being overbroad, is to attempt to give effect to the ordinance as written, while at the same time interpreting the statute or ordinance as written, while at the same time interpreting the statute or ordinance so that its constitutionality is preserved. Here that task involves reading the ordinance so that it prohibits the exposure of breasts as described in the ordinance, but without extending the prohibition to include those types of attire which are commonly accepted by modern society.[3]

In todays society, women's dress standards are quite liberal, especial in bathing suits and evening or "cocktail" wear. The modern women is free to wear brief bikinis, french cut bathing suits and varying degrees of lowdresses and gowns.[4]

In its clarifying order of August 22, 1983 the trial court interpreted the ordinance to require a certain type of clothing-a brassier-type top with supporting straps. In making this interpretation the trial court added terms to the ordinance which were not placed there by the City of Daytona Beach; and in so doing, the trial court brought into the ordinance's prohibition many types of female attire which are commonly accepted by modern society, thereby

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3 Broadrick V. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed. 2d 830, (1973): Schad V. Mount Ephraim, 452 U.S. 61, 68 L.Ed. 2d 67, 101 S.Ct. (1981).

4 City of Daytona Beach Vs. Ducille and Grier, Case No: V82-6886-DB.

rendering the ordinance overbroad. The City of Daytona Beach need not be accused of enacting an ordinace which would outlaw in lounges and restaurants clothing which is seen daily in public and even on prime-time television. The trial court failed to apply the ancient doctrines of casus omissus, expressio unius est exclusio alterius, and ut res magis valeat quam pereat.

ACCORDINGLY, the Order of the trial court is reversed and the cause is remanded for further proceedings not inconsistent herewitn.

DONE and ORDERED in Chambers at Daytona Beach, Volusia County, Florida this 21 day of November, A.D., 1983.

C. MCFERRIN SMITH, III
CIRCUIT JUDGE

Supreme Court, U.S.
FILED
MAR 7 1991
OFFICE OF THE CLERK

No. 90-1269

In The

Supreme Court of the United States

October Term, 1990

FUNCTION JUNCTION, INC., et al.,

Petitioners,

v.

PAUL CROWE, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondents would state the question presented as number III. as follows:

III. Does the imposition of attorneys' fees and double costs upon appellants under Fed. R. App. P. 38, without notice or an opportunity to be heard, violate due process requirements where the court found that the appellants' brief contained only conclusory assertions unsupported by argument or reason?

LIST OF PARTIES BELOW

Petitioners identified one of respondents as "City of Daytona Beach, a former municipal corporation". The City of Daytona Beach is currently in existence and is correctly identified:

THE CITY OF DAYTONA BEACH, a Florida municipal corporation.

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No. 90-1269

In The

Supreme Court of the United States

October Term, 1990

FUNCTION JUNCTION, INC., et al.,

Petitioners,

v.

PAUL CROWE, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

SUMMARY OF THE ARGUMENT

I. Petitioners have offered no applicable support for their argument that the decision below conflicts with precedent established by this Court on the issue of selective enforcement. The cases relied on by petitioners are *Houston v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987), which found a city ordinance unconstitutionally overbroad, and *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983), which held a state statute unconstitutionally vague.

II. Petitioners urge that the City of Daytona Beach ordinance prohibiting certain exposure in establishments dealing in alcoholic beverages must be more narrowly construed in order to meet constitutional requirements established by this Court. Again, the cases relied on by petitioners do not support their position. The City ordinance was enacted pursuant to twenty-first amendment authority to regulate alcohol as in *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S.Ct. 2529, 69 L.Ed.2d 357 (1981); the cases relied on by petitioners to limit the City's authority to regulate nudity do not involve such restrictions as a component of liquor regulation. And the 1981-82 state court opinions which petitioners argue were binding on the federal court were no longer viable after the Florida Supreme Court ruling in *City of Daytona Beach v. Del Percio*, 476 So.2d 197 (Fla. 1985).

III. This case, in which double costs and attorneys' fees were awarded against petitioners pursuant to Fed. R. App. P. 38, does not conflict with *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980), and the other cases cited by petitioners. *Roadway Express* and *Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987), dealt with sanctions imposed directly against an attorney for disciplinary purposes pursuant to other provisions of law. *Braley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987), was concerned with the imposition of fees as a sanction against an attorney pursuant to both 28 *U.S.C.* § 1927 and Fed. R. App. P. 38, and required a hearing to determine whether the attorney or the party was at fault. Courts dealing solely with Fed. R. App. P. 38 have not required a

hearing prior to imposition of sanctions because no factual issues exist. In this case, a hearing would serve no purpose since the court found the appeal frivolous as a matter of law and awarded damages against the party appellants.

ARGUMENT SUPPORTING DENIAL OF THE WRIT

I. THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH ANY PRECEDENT OF THIS COURT ON THE ISSUE OF UNCONSTITUTIONAL SELECTIVE ENFORCEMENT.

The Eleventh Circuit denied petitioners' claims that the challenged ordinance is unconstitutionally vague, unconstitutionally overbroad, and that the City enforced the ordinance in an unconstitutionally selective manner. Petitioners now merge these three distinct constitutional theories and claim that the ordinance is selectively enforced in violation of *Houston v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987), and *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).

Selective or discriminatory enforcement is referred to in *Houston v. Hill* and *Kolender v. Lawson* only as an *effect* of vagueness or overbreadth.

Houston v. Hill is an overbreadth case. It involved a Houston city ordinance which prohibited interrupting a police officer. This Court found that the ordinance was overbroad in that it was susceptible of regular application to protected expression and therefore invalid. This Court

specifically found that the ordinance was not vague. Selective enforcement as a constitutional violation in itself was not discussed.

Kolender v. Lawson is a vagueness case. A California statute requiring persons who loiter on streets to provide "credible and reliable" identification was held to be unconstitutionally vague on its face. *Kolender* did not involve claims of overbreadth or unconstitutionally selective enforcement.

Petitioners cite no cases which deal with selective enforcement as a constitutional violation. The Eleventh Circuit stated:

> According to the plaintiffs, this selective enforcement violates their right to equal protection under the fourteenth amendment. The district court analyzed this claim under the two-part selective enforcement standard set out in *Fillingim* [*v. Boone*, 835 F.2d 1389 (11th Cir. 1988)] and *Lanier* [*v. City of Newton*, 842 F.2d 253 (11th Cir. 1988)]. The court held that, although the plaintiffs had demonstrated under the standard's first element that they were singled out for prosecution among others who were similarly situated, the plaintiffs had not satisfied the standard's second requirement that this selection was invidious or in bad faith. 715 F. Supp. at 340. Again, the plaintiffs on appeal fail to state, let alone demonstrate, how the district court's conclusion is erroneous. That failure alone renders their appeal frivolous * * *

Petitioners' App. A-19.

Petitioners have made a similarly unsupported argument to this Court. The district court and the Eleventh Circuit followed precedent clearly established by this

Court in determining the selective enforcement issue, *see Oyler v. Boles*, 368 U. S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446 (1962), and petitioners have suggested no basis for error.

II. THE OPINION OF THE ELEVENTH CIRCUIT APPROVING THE DISTRICT COURT'S INTERPRETATION OF THE CITY'S ORDINANCE PROHIBITING NUDITY OR SEMI-NUDITY IN ESTABLISHMENTS DEALING IN ALCOHOLIC BEVERAGES CONFORMS TO THE PRECEDENTS SET BY THIS COURT IN *LaRUE, BELLANCA,* AND *IACOBUCCI*.

Petitioners present opinions written by state lower court judges in 1981-82, and submit that the Eleventh Circuit Court of Appeals erred in rejecting the judges' narrowing constructions of the ordinance. This appears to be an overbreadth argument.

In *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), this Court found that the broad powers of the states to regulate liquor under the twenty-first amendment outweigh first amendment interests in protecting nude dancing, and that a state could ban such activity as part of its liquor regulation program. *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S.Ct. 2529, 69 L.Ed.2d 357 (1981), held that this authority supported a state statute prohibiting topless dancing in licensed liquor establishments. And in *City of Newport v. Iacobucci*, 479 U.S. 92, 107 S.Ct. 383, 93 L.Ed.2d 862 (1986), this Court found that a state could delegate its twenty-first amendment powers to a city either in whole or in part, and upheld a city ordinance prohibiting nude or

nearly nude activity in a business establishment licensed to sell liquor for on-premises consumption.

At the time of the 1981-82 lower state court opinions cited by petitioners, it had not been determined whether the State of Florida had delegated to the City the authority which was relied on in *LaRue* and *Bellanca* to regulate liquor pursuant to the twenty-first amendment. This issue reached the Florida Supreme Court in 1985. It was held that the State of Florida has delegated its powers under the twenty-first amendment to the City. *City of Daytona Beach v. Del Percio*, 476 So.2d 197 (Fla. 1985).

The pre-1985 inferior state court decisions which petitioners urge this Court to accept as the correct interpretations of the ordinance were rendered without reliance on the powers available via the twenty-first amendment. In regard to these decisions, the Florida Supreme Court stated:

> The [Florida] district court [of Appeal] found that the variant interpretations of the ordinance demonstrated it was vague and therefore unconstitutional. We conclude, on the other hand, that the plain meaning of the ordinance is clear, and that the variant interpretations are merely the result of various courts attempting to limit the reach of the ordinance to save it from constitutional invalidity.

Del Percio, 476 So.2d at 200. The court found that the ordinance was neither vague nor overbroad in light of the twenty-first amendment, and that limiting constructions were unnecessary. *Id.* Accordingly, the inferior state court rulings prior to the 1985 Florida Supreme Court *Del Percio* decision have no precedential effect.

Petitioners cite *Schad v. Borough of Mt. Ephriam*, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), *Erznoznik v. City of Jacksonville*, 442 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975), *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972), *Houston v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987), *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975), and *Virginia v. American Booksellers Assn.*, 484 U.S. 383, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988), in support of their argument. None of these cases supports their contention that the ordinance is unconstitutional when the City's twenty-first amendment authority is considered. Similarly, petitioners' reference to *Miller v. Civil City of South Bend*, 904 F.2d 1081 (7th Cir. 1990), *cert. granted sub nom. Barnes v. Glenn Theater*, ___ U.S. ___, 111 S.Ct. 90, 112 L.Ed.2d 15 (1990), is inapposite. The Indiana statute challenged was not enacted pursuant to the twenty-first amendment and applies to all public places without regard to alcohol.

III. THE IMPOSITION OF SANCTIONS WITHOUT PRIOR NOTICE OR A HEARING PURSUANT TO FED. R. APP. P. 38 DOES NOT CONFLICT WITH *ROADWAY EXPRESS, INC. v. PIPER*.

Roadway Express, Inc. v. Piper, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980), did not involve an award of attorneys' fees to be paid by an appellant pursuant to Fed. R. App. P. 38. At issue in that case were the authority of the trial court to tax attorneys' fees directly against counsel pursuant to Fed. R. Civ. P. 37(b) (sanctions for discovery violations), 28 *U.S.C.* § 1927 (sanctions for

unreasonable and vexatious multiplication of proceedings by attorney), and the inherent powers of the court.

The section of the opinion quoted by petitioners was a discussion of inherent powers to award attorneys' fees for abuse of the process of the courts. 447 U.S. at 764-767, 100 S.Ct. at 2463-2465. This Court stated that these inherent powers must be exercised with "restraint and discretion". *Id.* at 764, 100 S.Ct. at 2463. This Court also noted that the trial court had not made a specific finding as to whether the attorney's conduct "constituted or was tantamount to bad faith, a finding that would have to precede any sanction under the court's inherent power." *Id.* at 767, 100 S.Ct. at 2465. The matter was returned to the district court for further proceedings.

Unlike the award in *Roadway Express*, the award of attorneys' fees here under Fed. R. App. P. 38 did not require a finding of bad faith. Sanctions imposed pursuant to Rule 38 have been distinguished.

In *Toepfer v. Department of Transportation*, 792 F.2d 1102 (Fed. Cir. 1988), the appellate court had awarded damages and costs against counsel for a petitioner pursuant to Fed. R. App. P. 38. Counsel filed a motion for hearing and other relief, claiming that sanctions could not be imposed without notice and a hearing. The court denied the motion, and stated:

> The damages and costs assessed against counsel were for bringing a frivolous appeal, not as a disciplinary action for conduct unbecoming an attorney or for violation of the federal rules or rules of the court. Rule 38 provides that, if the appeal is frivolous, damages and costs *may* be assessed. To require a hearing

> for the assessment of such damages and costs would impose on the opposing party and on the court an even greater burden in dealing with a frivolous appeal and entirely defeat the purpose of Rule 38. *See, e.g., Hyde v. Van Wormer,* ___ U.S. ___, 106 S.Ct. 403, 88 L.Ed.2d 355 (1985) (Supreme Court awarded damages under its Rule 49.2 without a hearing).
>
> * * * Counsels' assertion of a constitutional violation by failure to provide a hearing is an attack on the rule itself.

792 F.2d 1103.

The Seventh Circuit Court of Appeals discussed its procedures in Rule 38 cases as follows:

> Where, as in this and most Rule 38 cases, the conduct that is sought to be sanctioned consists of making objectively groundless legal arguments in briefs filed in this court, there are no issues that a hearing could illuminate. All the relevant "conduct" is laid out in the briefs themselves; neither the mental state of the attorney nor any other factual issue is pertinent to the imposition of sanctions for such conduct. Where a hearing is pointless it is not required, *see United States v. Nesglo, Inc.,* 744 F.2d 887 (1st Cir. 1984); * * *
>
> * * * *
>
> * * * A hearing is required in a proceeding concerning sanctions only if there is a contested factual issue; there is not and cannot be one in this case.

Hill v. Norfolk and Western Ry. Co., 814 F.2d 1192, 1201-2 (7th Cir. 1987). The court imposed sanctions against an appellant's attorney without a hearing, recognizing that this was its usual procedure. *Id.*

The Ninth Circuit has also imposed Rule 38 sanctions without a hearing. *See, e.g., Hatch v. Reliance Ins. Co.*, 758 F.2d 409 (9th Cir.) (double costs to be paid by appellants and attorneys' fees to be paid by appellants' counsel, awarded pursuant to Rule 38 without a hearing), *cert. den.*, 474 U.S. 1021, 106 S.Ct. 571, 88 L.Ed.2d 555 (1985), *motion for damages pursuant to Sup. Ct. R. 49.2 granted*, 474 U.S. 1048, 106 S.Ct. 782, 88 L.Ed.2d 761 (1986).

As mentioned by petitioners, the sanctions imposed by the Eleventh Circuit in *Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987), were pursuant to Fed. R. Civ. P. 11. The case contains a general discussion of due process in the context of disciplinary sanctions imposed against an attorney, but is of no particular assistance in resolving the issue raised here. The Eleventh Circuit also decided the present case, and imposed *Rule 38* sanctions without a hearing. Petitioners raised the due process issue before the Eleventh Circuit in a petition for rehearing or rehearing en banc; rehearing was denied. Petitioners' App. B.

In *Braley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987), a hearing was required prior to imposition of sanctions against an attorney where the sanctions were imposed with reliance on *both* Fed. R. App. P. 38 and 28 *U.S.C.* § 1927. The court discussed the due process requirements without distinguishing between the two different provisions for the imposition of sanctions, *id.* at 1513-15, and stated:

> In one sense notice may seem superfluous when an appellate court has determined, after considering briefs, argument and the record that

> the appeal is so unmeritorious as to be frivolous. The court's determination is a judgment on the state of the law as applied to the facts in the record. The only possible rebuttal to the court's conclusion would be a demonstration that the court overlooked controlling statute or case law or misread the record. A petition for rehearing would seem adequate to bring such errors to the court's attention.

Id. at 1514.

The Tenth Circuit, however, found that a hearing was required for one purpose:

> [T]he determination to impose sanctions *on an attorney* for bringing a frivolous appeal involves another step – placing the blame. And there remains for consideration the defenses which might absolve the lawyer for the responsibility for taking the frivolous appeal. This, we hold, justifies and requires notice and opportunity to be heard before final judgment.

Id. (emphasis supplied). Under the cases cited above where sanctions were imposed solely on the authority of Rule 38, no defense would be available. *Hill*, 814 F.2d 1192; *Toepfer*, 792 F.2d 1102.

The approach of the Fifth Circuit has been to assess attorneys' fees without a hearing against the party pursuant to Fed. R. App. P. 38 and against counsel citing 28 *U.S.C.* § 1927, and then to remand the case to the district court for proceedings to apportion blame. *See, e.g., Corpus Christi Taxpayer's Association v. City of Corpus Christi*, 858 F.2d 973 (5th Cir. 1988), *rehearing denied*, 860 F.2d 437 (5th Cir.), *cert. den.*, 490 U.S. 1065, 109 S.Ct. 2064, 104 L.Ed.2d 629 (1989).

In the case at issue, the sanction imposed was against petitioners only (appellants below), not their counsel, although the court noted that Fed. R. Civ. P. 11 sanctions had previously been imposed against petitioners' attorney by the district court in a case involving the same issues. Petitioners' App. A-10 n.7. Petitioners have cited no cases to suggest that *parties* can be absolved from responsibility for their own litigation, the only issue which *Braley* found necessitated a hearing.

The opinion of the Eleventh Circuit Court of Appeals clearly sets forth the basis of its decision that the appeal in this case was frivolous. The court found that petitioners ignored established precedent, Petitioners' App. A-8, 9, 14, 18; cited inapplicable case law as support for their arguments, Petitioners' App. A-14; failed to distinguish authority which clearly rejected their position, Petitioners' App. A-14; and totally failed to provide legal support or argument to support contentions of error, Petitioners' App. A-11, 14, 15, 19. Double costs and attorneys' fees were awarded to the City against petitioners as damages pursuant to Fed. R. App. P. 38 upon the finding that the appeal was frivolous. So distinguished, the opinion in this case does not conflict with any precedent cited by petitioners.

CONCLUSION

The opinion of the court below follows clearly established precedent. No conflict with this or any other court has been shown. The petition for certiorari in this case is frivolous and should be denied, with damages awarded to respondents in accordance with Supreme Court Rule 42.2 and respondents' motion filed under separate cover.

Respectfully submitted,

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No. 90-1269

MOTION FILED
MAR 7 1991

In The

Supreme Court of the United States

October Term, 1990

FUNCTION JUNCTION, INC., et al.,

Petitioners,

v.

PAUL CROWE, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' MOTION FOR DAMAGES PURSUANT TO SUPREME COURT RULE 42.2

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No. 90-1269

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Petitioners,

v.

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Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' MOTION FOR DAMAGES PURSUANT TO SUPREME COURT RULE 42.2

MOTION FOR AWARD OF DAMAGES PURSUANT TO SUPREME COURT RULE 42.2 FOR FRIVOLOUS FILING OF PETITION FOR WRIT OF CERTIORARI.

Supreme Court Rule 42.2 (formerly R. 49.2) provides:

> When a petition for writ of certiorari, an appeal, or application for other relief is frivolous, the Court may award the respondent or appellee just damages and single or double costs. Damages or costs may be awarded against

> the petitioner, appellant, or applicant, or against the party's attorney or against both.

Damages have been awarded in some recent cases. *E.g., Tatum v. Regents of the University of Nebraska*, 462 U.S. 1117, 103 S.Ct. 3084, 77 L.Ed.2d 1346 (1983); *Hyde v. Van Wormer*, 474 U.S. 992, 106 S.Ct. 403, 88 L.Ed.2d 355 (1985); *Hatch v. Reliance Insurance Co.*, 474 U.S. 1048, 106 S.Ct. 782, 88 L.Ed.2d 761 (1986). This case is appropriate for such an award.

As demonstrated in respondents' Brief in Opposition, the petition for writ of certiorari is patently frivolous. In *Jorgenson v. County of Volusia*, 625 F.Supp. 1543 (M.D. Fla. 1986), sanctions were imposed on Eric A. Latinsky, the same attorney representing petitioners here, pursuant to Fed. R. Civ. P. 11. Jorgenson, represented by attorneys Latinsky and Fred W. Fendt, filed a complaint and request for a temporary restraining order against enforcement of a county ordinance virtually identical to the City of Daytona Beach ordinance challenged here. In their supporting memorandum, Jorgenson's attorneys failed to cite the controlling cases, *City of Daytona Beach v. Del Percio*, 476 So.2d 197 (Fla. 1985) and *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S.Ct. 2529, 69 L.Ed.2d 357 (1981), even though Latinsky had represented Del Percio in the state court. *See* 625 F.Supp. at 1547. Instead, they urged the court to apply standards drawn from cases which did not involve the twenty-first amendment. *Id.* The trial court fined counsel $500 for "their misleading and unethical representation of the controlling law in Florida regarding an ordinance governing sexual display in establishments dealing in alcoholic beverages legislated under the Twenty-first Amendment." *Id.*

at 1549. This decision was appealed, and the Eleventh Circuit reversed the Rule 11 sanctions for failure to provide notice and a hearing. 824 F.2d 973 (11th Cir. 1987). The district court reaffirmed the sanctions after a hearing on remand; another appeal was taken and the sanctions were affirmed. 846 F.2d 1350 (11th Cir. 1987).

Latinsky represented these petitioners in their appeal before the Eleventh Circuit Court of Appeals. The 1990 opinion awarding damages pursuant to Fed. R. App. P. 38 cites reasons similar to those found in *Jorgenson*, 625 F.Supp. 1543. In respect to their argument that the ordinance was erroneously analyzed under the twenty-first amendment, the court stated that petitioners had failed to provide legal support, had failed "to address the string of Eleventh Circuit cases that have expressly analyzed virtually identical ordinances under the twenty-first amendment", and failed to address the Supreme Court decision in *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 60 S.Ct. 163, 84 L.Ed. 128 (1939). Petitioners' App. A-8, 10. Petitioners' treatment of the other issues raised was found to be equally frivolous, with cases applied inappropriately, lack of legal support for arguments, and controlling precedents ignored or not distinguished. Petitioners' App. A. Request for rehearing or rehearing en banc was denied. Petitioners' App. B.

Despite the decision below clearly identifying the frivolous nature of the arguments, this petition for writ of certiorari was filed, *again* presenting conclusory, inappropriate, and unsupported arguments. Respondents have been forced to devote 39.25 hours of attorney time and expend the sum of $1230.13 in order to respond to

petition in accordance with professional standards and the Supreme Court Rules. *See* Respondents' App. 1.

The exceptional history of litigation as discussed above shows that the filing of this petition was a gross abuse of the judicial process which warrants an award of damages pursuant to Supreme Court Rule 42.2. "[E]very misuse of any court's time impinges on the right of other litigants with valid or at least arguable claims to gain access to the judicial process." *Talamini v. Allstate Insurance Company*, 470 U.S. 1067, 1073, 105 S.Ct. 1824, 1828, 85 L.Ed.2d 125 (1985) (Burger, C.J., dissenting). In *Hatch v. Reliance Ins. Co.*, 474 U.S. 1048, this Court granted a motion for damages pursuant to former Sup. Ct. R. 49.2 where a petition for writ of certiorari was filed and denied in a case which the Court of Appeals had found to be frivolous. *Hatch*, 758 F.2d 409 (9th Cir.) *cert. den.*, 474 U.S. 1021, 106 S.Ct. 571, 88 L.Ed.2d 555 (1985).

CONCLUSION

Respondents request that this Court grant the motion for damages pursuant to Supreme Court Rule 42.2, and require petitioners to pay respondents an appropriate sum. Respondents suggest the amount of $5,000 or alternatively suggest that the matter be returned to the district court for determination of the amount due.

Respectfully submitted,

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FRANK B. GUMMEY, III
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MARIE HARTMAN
Assistant City Attorney

By: /s/ FRANK B. GUMMEY, III
Counsel of Record

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF VOLUSIA

Before me this day personally appeared FRANK B. GUMMEY, III, who, being duly sworn deposes and says:

1. I am a duly licensed attorney practicing law in Daytona Beach, Florida. I graduated from the University of Florida Law School in December 1972, and have been a member in good standing of the Florida Bar since 1973. I am a full time salaried officer of The City of Daytona Beach serving as City Attorney. My office staff includes three full time Assistant City Attorneys, each with over ten years experience.

2. In order to represent the City of Daytona Beach in accordance with professional legal standards and the Supreme Court Rules, my office has devoted the following hours of attorney time and incurred the following expenses:

DATE	ACTIVITY	HOURS
2-08-91	Review Pet. for Cert.	1.0
2-14-91	Review Pet. & opinions & cases cited	3.0
2-15-91	Review Sup. Ct. Rules	0.5
2-18-91	Research and drafting Response	6.0
2-19-91	Research and drafting Response	6.0
2-21-91	Research and drafting Response	4.0
2-22-91	Research and drafting Response	6.0
2-25-91	Drafting Response	3.5
2-25-91	Motion for fees	0.5
2-26-91	Research Rule 42.2	1.25
2-27-91	Motion for fees	2.5
2-28-91	Motion for fees	3.0

3-01-91	Motion for fees	1.0
3-06-91	Review of proofs from printer	1.0
	TOTAL HOURS	39.25

OUT-OF-POCKET EXPENDITURES

2-19-91	Copies at Vol. County Law Library 1 page @ $.25 per page (actual cost)	$ .25
2-21-91	Copies at Vol. County Law Library 15 pages @ $.25 per page (actual cost)	3.75
2-26-91	Copies at Vol. County Law Library 4 pages @ $.25 per page (actual cost)	1.00
2-28-91	Westlaw	40.00
3-01-91	Federal Express	22.50
3-07-91	Federal Express	15.00
3-07-91	Printing costs (Printers estimate)	1147.63
	TOTAL EXPENSES	1230.13

FURTHER AFFIANT SAYETH NOT.

/s/ FRANK B. GUMMEY, III

Sworn to and subscribed before
me this 7 day of March, 1991.
/s/ Evelyn Gonzalez
Notary Public, State of Florida
My commission expires: May 1994.